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No. OFFICE OF THE CLERK

In The
Supreme Court of The United States
October Term 1996

BILLIE M. IRELAND,
Petitioner,

v.

GARY L. TUNIS, RICHARD THOMPSON, JOHN MEIERS AND RICHARD D. KUHN,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

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234 pp

QUESTIONS PRESENTED

I.

WHERE MICHIGAN CASE LAW HAS HELD THAT A CIRCUIT JUDGE IS WITHOUT JURISDICTION TO ISSUE AN ARREST WARRANT, IS A CIRCUIT JUDGE IMMUNE FROM LIABILITY IN AN ACTION PURSUANT TO 42 U.S.C. § 1983 FOR SIGNING AN ARREST WARRANT THAT VIOLATED THE FOURTH AMENDMENT?

II.

WHERE A PROSECUTOR AND HIS ASSISTANT PROCURED AN ARREST WARRANT FROM A JUDGE WITHOUT JURISDICTION, ARE THEY IMMUNE FROM LIBAILITY IN AN ACTION PURSUANT TO 42 U.S.C. § 1983 FOR THE PROCUREMENT OF A WARRANT THAT VIOLATED THE FOURTH AMENDMENT?

LIST OF PARTIES

The parties to the proceeding below were the petitioner, Billie M. Ireland, the former mayor of Rochester Hills, Michigan, who was the plaintiff in the court below and the respondents, Gary L. Tunis, an assistant prosecutor, Richard Thompson, a former elected county prosecutor, John Meiers, a prosecutor's investigator, and Richard D. Kuhn, a circuit judge, who were the defendants in the court below. There have been no other parties to this action.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 3

CONSTITUTIONAL PROVISIONS INVOLVED 3

INTRODUCTION - SUMMARY OF ARGUMENT 4

STATEMENT OF THE CASE..... 7

REASONS FOR GRANTING THE WRIT:

I. WHERE MICHIGAN CASE LAW HAS HELD THAT A CIRCUIT JUDGE IS WITHOUT JURISDICTION TO ISSUE AN ARREST WARRANT, A JUDGE WHO SIGNED A WARRANT IS ACTING "IN THE CLEAR ABSENCE OF ALL JURISDICTION" AND THUS IS NOT IMMUNE FROM LIABILITY PURSUANT TO 42 U.S.C. § 1983 FOR THE ISSUANCE OF A WARRANT IN VIOLATION OF THE FOURTH AMENDMENT 11

II. WHERE PROSECUTORS PROCURED AN ARREST WARRANT FROM A COURT WITHOUT SUBJECT MATTER JURISDICTION, THE PROSECUTORS ARE NOT IMMUNE FROM LIABILITY PURSUANT TO 42 U.S.C. § 1983 FOR THE PROCUREMENT OF A WARRANT WHICH VIOLATED THE FOURTH AMENDMENT 20

PAGE

CONCLUSION 25

TABLE OF AUTHORITIES

Cases:

Buckley v. Fitzsimmons, 509 U.S. 259, (1993) 7, 20, 21, 22

Burns v. Reed, 500 U.S. 478 ..... 7, 20, 21, 22 (1991)

Genesee Prosecutor v. Judge, 391 Mich. 115, 215 N.W. 2d 145 1974) 16

Hoppe v. Clapperich, 28 N.W.2d 780 ..... 6 (Minn. 1947)

Imbler v. Pachtman, 424 U.S. 409, (1976) 20, 21 22

In re: Elliot, 315 Mich. 662, 24 N.W.2d 528 (1948) 16

Joseph v. Patterson, 795 F.2d 549, (6th Cir. 1986) 22, 23

Kalina v. Fletcher, 93 F.3d 653 (1995), Cert. granted, ___U.S.___117 S. Ct. 1079 (1997) 23, 25

Kent Prosecuting Attorney v. Kent Circuit Judges, 110 Mich. App. 44, 314 N.W. 2d 135 (1981) 16

King v. Love, 766 F. 2d 962 (6th Cir. 1985) 5, 18, 19

Maestri v. Jutkofsy, 860 F.2d 50 (2d Cir. 1988), cert. den. 489 U.S. 1016 (1988) 5

PAGE

People v. Curtis, 389 Mich. 698, 209 N.W. 2d 243 (1973) 16

People v. Johnson, 427 Mich. 98, 398 N.W. 2d 219 (1986) 16

People v. Farmilo, 137 Mich. App. 378, 358 N.W. 2d 350 (1984)..... 13-16, 23, 24

People v. Loukas, 104 Mich. App. 204, 304 N.W. 2d 532 (1981) 17

People v. Collins, 52 Mich. App. 332, 217 N.W. 2d 119 (1974), cert. den., 429 U.S. 888, (1976) 14

Pierson v. Ray, 386 U.S. 547 (1967) 12

Randall v. Brigham, 7 Wall. 523, 536 (1869) 11

Stump v. Sparkman, 435 U.S. 354 (1978) 4-6, 12, 13, 25

Utley v. Independence, 402 P.2d 91 (Ore. 1964) 6

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BILLIE M. IRELAND,

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GARY L. TUNIS, RICHARD THOMPSON, JOHN MEIERS and RICHARD D. KUHN,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petitioner, Billie M. Ireland, requests that a Writ of Certiorari issue to review the opinion of the United States Circuit Court of Appeals for the Sixth Circuit entered in this proceeding on May 15, 1997, and the order denying rehearing en banc denied June 26, 1997.

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals which is sought to be reviewed is publisned at 113 F. 3d 1435, and is reprinted in the Appendix at p. A-1. The order of the Sixth Circuit Court of Appeals denying rehearing is unreported and is reprinted in the Appendix at p. D-1. The order of the trial court granting defendants' Gary L. Tunis', Richard Thompson's and John Meiers' motion for summary judgment is unreported and reprinted in the Appendix at p. C-1; the trial court's opinion granting summary judgment for those parties is reported at 907 F. Supp. 1088, and is reprinted in the Appendix at p. C-3. The trial court's final order granting defendant Richard D. Kuhn's motion for summary judgment is unreported and is reprinted in the Appendix at p. B-25; the trial court's opinion granting defendant Kuhn's motion for summary judgment is reported at 893 F. Supp. 724 and is reprinted in the Appendix at p. B-1.

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on May 15, 1997; a timely motion for rehearing and suggestion for rehearing en banc was denied by order dated June 26, 1997. This Petition for Certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation * * * *

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom,

or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. * * *

INTRODUCTION - SUMMARY OF ARGUMENT

1. Judicial Immunity

In Stump v. Sparkman, 435 U.S. 354, 359 (1978), this Court held that an Indiana circuit court judge was immune from liability for issuing an order of sterilization of a minor because his action was not "in the clear absence of all jurisdiction." The Court found it "significant" that no Indiana statute or case law prohibited the judge from so acting.

The decision of the Sixth Circuit in this

case finding a judge immune for the signing of an arrest warrant conflicts with Stump v. Sparkman, because a case of the Michigan Court of Appeals has squarely held that a circuit court judge is without jurisdiction to issue an arrest warrant and cases of the Michigan Supreme Court have held that a circuit judge is without subject matter jurisdiction to act in a criminal case until the case is bound over to that judge from the district court.

The decision of the Sixth Circuit is also contrary to its own precedent, King v. Love, 766 F. 2d 962 (6th Cir. 1985), where the Court found that a judge was not entitled to judicial immunity if the judge acted on a matter outside the subject matter jurisdiction of the court over which he presides.

The Sixth Circuit's decision is also contrary to Maestri v. Jutkofsky, 860 F. 2d 50 (2d Cir. 1988), cert. den. 489 U.S. 1016 (1988), where that court held that a New York justice of the peace did not have judicial

immunity in a civil rights case for issuing an arrest warrant in a neighboring town over which he had no jurisdiction.

State court decisions have also held that judges who act outside their jurisdiction in issuing an arrest warrant are not entitled to immunity. See, Hoppe v. Clapperich, 28 N.W.2d 780 (Minn. 1947); Utley v. Independence, 402 P.2d 91 (Ore. 1964).

Granting this Petition for Certiorari and affirming the rule in Stump v. Sparkman that federal courts must look to state court case law to determine whether jurisdiction existed for a judge's action when determining judicial immunity is important to the uniform decisions of the courts.

2. Prosecutional Immunity

The second question presented to this Court is whether a prosecutor is immune from liability where he procures a warrant from a judge without jurisdiction. This question has not been presented to this Court before, but

has been approached by Justice Scalia in his concurring opinions in Burns v. Reed, 500 U.S. 478 (1991) and Buckley v. Fitzsimmons, 509 U.S. 259 (1993).

The petitioner is without remedy except in this Court.

STATEMENT OF THE CASE

On December 8, 1994, the plaintiff filed a complaint against all defendants in the Eastern District of Michigan, Southern Division, alleging violations of 42 U.S.C. § 1983. Jurisdiction over the complaint was sought pursuant to 28 U.S.C. § 1331. On July 13, 1995, the trial court entered summary judgment for the defendant Richard D. Kuhn, a circuit judge, finding that he was immune from liability. This judgment was certified as a final judgment on August 29, 1995, pursuant to F.R. Civ. P. 54(b). On November 15, 1995, the trial court entered final judgment for defendants Gary L. Tunis, an assistant prosecutor, Richard Thompson, the elected

county prosecutor, and John Meiers, an investigator for the prosecutor's office, also on the grounds of immunity.

A notice of appeal was filed in the district court by the plaintiff on September 27, 1995, from the final judgment for defendant Kuhn, and on November 30, 1995, from the final judgment in favor of defendants Tunis, Thompson and Meiers. Jurisdiction of the Sixth Circuit existed pursuant to 28 U.S.C. § 1291.

The City of Rochester Hills, Michigan, contracted with Oakland County, Michigan, to employ deputy sheriffs of Oakland County as its police force; since 1990, the County had provided by contract a captain who, in essence, was the "chief of police" of Rochester Hills. The captain provided by the County, Gerard Carlin, requested that the City pay overtime pay directly to him for services rendered to the City. Reimbursement for police services was made by the City to the

County. The plaintiff, the Mayor of Rochester Hills, and her assistant, Doris Keylon, believing that the contract with Oakland County permitted the City to pay overtime directly to the captain, and believing that the Oakland County Sheriff had approved direct payment of overtime, authorized direct payment. Direct payment was also approved by the City's budget director and the amounts paid were within the City's budget for public services, although not specifically itemized.

As the result of an anonymous letter mailed to a major in the Oakland County Sheriff's Department, the Sheriff's Department and the Oakland County Prosecutor's Office, headed by the defendant Thompson, began an investigation in December of 1992 as to whether the direct payments to Captain Carlin were somehow illegal.

The defendant Tunis prepared a complaint and warrant which was signed by defendant Richard D. Kuhn, an Oakland County Circuit

Judge, on October 5, 1993, in chambers in a proceeding that was not on the record. Judge Kuhn had no pending case on his docket at the time he signed the warrant and relied on no information outside of the written complaint. After the warrant was signed, the warrant was filed in the Michigan district court for the 52-3 Judicial District, the court that had jurisdiction over the complaint and warrant. p. E-1. The warrant that Judge Kuhn signed charged the plaintiff, Billie M. Ireland, then the mayor of the City of Rochester Hills, with felonies.

The defendant Kuhn has claimed that, as "chief judge" of his court, he could sign warrants in various situations, including "political situations."

Judge Ralph Nelson of the 52-3 District Court held in a pretrial ruling that the complaint and warrant issued by Judge Kuhn were issued in violation of basic Fourth Amendment requirements. K-1 At the conclusion

of the preliminary examination on the charges, Judge Nelson dismissed all charges against Mayor Ireland and Doris Keylon, finding that there was no probable cause that they be charged with any offense. p. K-1 Captain Carlin was taken to trial on one misdemeanor count and acquitted of that charge.

REASONS FOR GRANTING THE WRIT

I. WHERE MICHIGAN CASE LAW HAS HELD THAT A CIRCUIT JUDGE IS WITHOUT JURISDICTION TO ISSUE AN ARREST WARRANT, A JUDGE WHO SIGNED A WARRANT IS ACTING "IN THE CLEAR ABSENCE OF ALL JURISDICTION" AND THUS IS NOT IMMUNE FROM LIABILITY PURSUANT TO 42 U.S.C. § 1983 FOR THE ISSUANCE OF A WARRANT IN VIOLATION OF THE FOURTH AMENDMENT

In Randall v. Brigham, 7 Wall. 523, 537 (1869), this Court established a rule that judges are immune from liability for their acts unless the acts are "in excess of the jurisdiction of the judges * * * *" Judicial

immunity has been extended to judges in actions brought pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983. Pierson v. Ray, 386 U.S. 547 (1967).

In Stump v. Sparkman, supra, this Court found that a judge who issued an order for sterilization of a minor did not act "in the clear absence of all jurisdiction" even though there was no specific civil action explicitly permitted in Indiana that would allow a judge to issue such an order. Since the Indiana circuit court was a court of general jurisdiction, this Court reasoned, then the judge could enter an order in a petition duly filed with the court. Thus, the judge was immune from liability in an action brought pursuant to 42 U.S.C. § 1983.

After noting that the Indiana statutes did not itemize the types of cases over which circuit courts could sit, the Court stated:

> "But in our view, it is more significant that there was no Indiana statute and no

case law in 1971 prohibiting a circuit court, a court of general jurisdiction, from considering a petition of the type to Judge Stump." 435 U.S. at 359.

The Court went on to state:

> "We agree with the District Court, it appearing that neither by statute nor by case law has the broad jurisdiction granted to the circuit courts of Indiana been circumscribed to foreclose consideration of a petition for authorization of a minor's sterilization." Id.

Federal courts, in deciding whether state court judges have jurisdiction over subject matter for purposes of judicial immunity, must look to the statutes and cases of the state in which the judge's immunity was challenged.

The Sixth Circuit should have followed People v. Farmilo, 137 Mich. App. 378, 380, 358 N.W. 2d 350 (1984), which squarely held that a circuit court judge does not have

jurisdiction to sign an arrest warrant.[1] p. J-1 Instead, the panel opinion attempted to interpret away the holding of the case.

Farmilo, a two page opinion, has been subjected to more than two pages of interpretation by both the District Court and the Court of Appeals. Farmilo is a simple opinion which stands for a simple proposition: In Michigan, circuit court judges do not have jurisdiction to sign a warrant for arrest. In Farmilo, a circuit court judge held that he had no jurisdiction to sign an arrest warrant. When the Michigan Court of Appeals affirmed that decision, they were

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[1] Michigan law is clear that even if the warrant issued is invalid, once the courts take jurisdiction over the defendant, the invalidity of the warrant cannot be used as a basis for overturning a criminal conviction. See People v. Collins, 52 Mich. App. 332, 217 N.W.2d 119 (1974), cert. den., 429 U.S. 888, (1976) (Once the district court obtains jurisdiction over the defendant, proof of an invalid arrest warrant does not divest the court of jurisdiction).

affirming the rule of law that a circuit court judge does not have jurisdiction to issue an arrest warrant. In its final paragraph of the opinion, the Michigan Court of Appeals left no doubt that a circuit court judge does not have jurisdiction over a criminal case in order to write an arrest warrant:

> "Except in cases brought before the circuit court by indictment or appeal from a lower court, the jurisdiction of the circuit court in criminal cases is limited to the crime or crimes included in the determination of the examining magistrate. The circuit court gains jurisdiction over a defendant charged with a criminal offense triable in circuit court upon the filing of a return by the examining magistrate showing that the defendant waived preliminary examination, or that a preliminary

examination was had and the defendant was properly bound over for trial."

In support of this conclusion, the Court of Appeals cited In re: Elliot, 315 Mich. 662, 24 N.W. 2d 528 (1946).

The Sixth Circuit ignored a long line of Michigan cases which have held that a Michigan circuit court does not acquire jurisdiction over a criminal felony case unless and until the case has been bound over from district court by a magistrate. See, People v. Curtis, 389 Mich. 698, 670, 209 N.W. 2d 243 (1973); Genesee Prosecutor v. Judge, 391 Mich. 115, 119, 215 N.W. 2d 145 (1974); People v. Johnson, 427 Mich. 98, 106 fn. 7, 398 N.W. 2d 219 (1986). See also, Kent Prosecuting Attorney v. Kent Circuit Judges, 110 Mich. App. 44, 314 N.W. 2d 135 (1981), where the Michigan Court of Appeals held that a circuit court judge without a case pending before him could not issue an order.

Nowhere in the opinion of the Sixth Circuit did the court address any of the Michigan Supreme Court decisions cited above. Instead, the Court looked to People v. Loukas, 104 Mich. App. 204, 304 N.W. 2d 532 (1981), which the panel claimed stands for the proposition that circuit courts have broad jurisdiction. The reliance on Loukas is misplaced; Loukas merely stands for the proposition that when an examining magistrate binds a defendant over to the circuit court, any misdemeanor charges pending in the district court may be included in the bindover. Loukas does not hold that circuit court judges have broad jurisdiction over all crimes, nor does it modify the rule that the circuit court has no subject matter jurisdiction over a criminal felony case until there is a bindover from the district court.

The Sixth Circuit panel found subject

matter jurisdiction over arrest warrants by circuit judges by looking to the "longstanding practice" of chief judges of the Oakland County Circuit Court in issuing arrest warrants. p. A-17, 18 Custom or practice cannot confer jurisdiction, and the panel cites to no decisions which reached such a conclusion.

The Sixth Circuit opinion in this case violated the circuit's own precedent. In King v. Love, supra, the Sixtn Circuit drew a distinction between when a judge "acts in the clear absence of all jurisdiction," and therefore is not immune, and when a judge "exceeds his authority" and still retains his or her immunity. 766 F. 2d at 965-966.

The panel deciding King v. Love held:

> "A judge acts in the clear absence of all jurisdiction if the matter upon which he acts is clearly outside the subject matter jurisdiction of the

court over which he presides." 766 F. 2d at 965.

And, a judge does not act in the clear absence of jurisdiction when the judge acts in a matter "over which his court has subject matter jurisdiction." 766 F. 2d at 966. Thus, the Sixth Circuit has previously held that the distinguishing factor as to whether governmental immunity applies is "subject matter jurisdiction."

Judge Kuhn had no immunity because he had no subject matter jurisdiction over the warrant he signed and he would acquire none until the case were bound over from the district court, which never occurred. Although Judge Kuhn signed a warrant in this case, the complaint on which the warrant was based was filed with the district court, where jurisdiction over the warrant lay; the warrant bears the stamp of authenticity of the district

court. p. E-1

II. WHERE PROSECUTORS PROCURED AN ARREST WARRANT FROM A COURT WITHOUT SUBJECT MATTER JURISDICTION, THE PROSECUTORS ARE NOT IMMUNE FROM LIABILITY PURSUANT to 42 U.S.C. § 1983 FOR THE PROCUREMENT OF A WARRANT WHICH VIOLATED THE FOURTH AMENDMENT

A prosecuting attorney is absolutely immune from civil rights liability where he or she participates in court proceedings, beginning with the court's issuance of the warrant. Imbler v. Pachtman, 424 U.S. 409, (1976); Burns v. Reed, supra; Buckley v. Fitzsimmons, supra.

Imbler, a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution and presenting the state's case, was absolutely immune from a civil rights suit. This Court found that the common law immunity of a prosecutor was

extended to a prosecutor in a civil rights case. That common law immunity "is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties." The prosecutor's "activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force." 424 U.S. at 430.

In Burns, this Court answered some of the questions left unanswered by Imbler, when, in an opinion joined by six justices, it held that a prosecutor was absolutely immune regarding his appearance in court as a lawyer for the state at a probable cause hearing, but not absolutely immune regarding the legal advice he gave to to the police during an investigative phase of a criminal case, for which he was entitled only to qualified immunity. The

court found that appearing at a probable cause hearing is "intimately associated with the judicial phase of the criminal process," but advice to the police is not. Burns, 114 L.Ed.2d 547, 562, quoting Imbler, 424 U.S. at 430.

In Buckley, this Court found no absolute immunity for a prosecutor's investigative duties and functions that did not relate to his advocacy function. Particularly, the Court held that there is no immunity for statements to the press.

Exactly when the prosecutor abandons his investigative function and begins his advocacy function appears to be an area on which the justices of this Court disagree. See the concurring opinions of Justice Scalia in both Burns and Buckley.

The Sixth Circuit's seminal prosecutional immunity decision is in conflict with other circuits. See, Joseph v. Patterson, 795 F.2d 549, (6th Cir.

1986).[2] That conflict is now before this Court in Kalina v. Fletcher, 93 F. 3d 653, (1995), cert. granted, __ U.S. ___, 117 S.Ct. 1079 (1997).

Simply put, the prosecutor is immune for his participation in the judicial process, not because of his status as an elected official.

This case brings before the court an unanswered question: if the prosecution seeks to initiate a prosecution and begins it improperly because the warrant has not been issued by a court with jurisdiction to issue a warrant, is the prosecutor entitled to the protection of absolute immunity attaching to the judicial process? Based on the decision of People v. Farmilo, supra, Michigan circuit

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[2] The defendant Thompson in this case, was also a defendant in Joseph v. Patterson.

court judges do not have jurisdiction to issue a warrant in a felony case, and the prosecutor's immunity should not apply to an off the record proceeding before a judge without jurisdiction. But since the Sixth Circuit refused to follow Farmilo, it held that the prosecutor was entitled to immunity. The Sixth Circuit's application of absolute immunity to Thompson and Tunis should be reversed since they did not procure the infirm warrant at a valid judicial proceeding.

If this Court grants this Petition for Certiorari, the plaintiff would also like to address the question of whether the Sixth Circuit's decision in affirming qualified immunity to the investigator Meiers was correct, since the Sixth Circuit resolved factual issues in favor of Meiers, instead of allowing a jury to determine those issues. The immunity of investigator Meiers is also a matter that may be impacted by this Court's decision in the Petition for Certiorari now

pending before the court in Kalina v. Fletcher, supra.

CONCLUSION

The rule of Stump v. Sparkman that a federal court looks to state court cases and statutes to determine whether a judge is acting in the clear absence of all jurisdiction, and thus is immune from liability, was violated in this case when the Sixth Circuit refused to follow original Michigan precedent that a Michigan circuit judge does not have jurisdcition to issue an arrest warrant. When the prosecutor procures an arrest warrant in a court without jurisdiction, no judicial proceeding occurs and the prosecutor should not be afforded immunity.

The extention of immunity to the judge and the prosecutors in this case violated the decision of this court, as well as a decision of the Second Circuit and a prior decision of the Sixth Circuit. The Sixth Circuit decision

in this case has the effect of expanding judicial immunity to judges who act outside their subject matter jurisdiction.

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Sixth Circuit.

Respectfully submitted,

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Dated: September 23, 1997

APPENDIX CONTENTS

Page No.

A. OPINION FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT 1-44

B. ORDER AND OPINION FOR DISTRICT COURT CIVIL CASE NO. 94-CV-74931-DT ENTERED 7/13/95 & 8/29/95 . 1-26

C. ORDER AND OPINION FOR DISTRICT COURT CIVIL CASE NO. 94-CV-74931-DT ENTERED 11/15/955 1-64

D. ORDER DENYING PETITION FOR REHEARING *EN BANC* 1-2

E. COMPLAINT FILED IN *PEOPLE V. GERARD LEO CARLIN; BILLIE MARIE IRELAND' DORIS KEYLON* 1-23

F. MCL 600.151, 600.601, 600.605, 764.1/1A, 600.8511 AND 691.1407 . . 1-15

G. OPINION OF 52-A DISTRICT COURT . 1-7

H. ART. 6 § 13 MICHIGAN CONST. 1963 1

I. MCR 6.102 AND 8.110 1-7

J. PEOPLE v. FARMILO 1-3

K. ORDER OF DISMISSAL OR ACQUITTAL IN *PEOPLE v. BILLIE MARIE IRELAND* . . 1

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
OPINION, FILED MAY 15, 1997

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24
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Nos. 95-2244/2333

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BILLIE M. IRELAND,
Plaintiff-Appellant,

v.

GARY L. TUNIS, RICHARD THOMPSON, JOHN MEIERS, and RICHARD D. KUHN,
Defendants-Appellees.

Decided and Filed May 15, 1997

Before: MARTIN, Chief Judge; NORRIS and MOORE, Circuit Judges.

OPINION

KAREN NELSON MOORE, Circuit Judge. This appeal addresses the precise scope of immunity from civil suit afforded to a state court judge, county prosecutors, and an investigator employed by the prosecutor's office for their roles in seeking and issuing an arrest warrant. Plaintiff-Appellant Billie M. Ireland, Mayor of the City of Rochester Hills, Michigan, sued defendants, an Oakland County Circuit Court Judge, two Oakland County prosecutors, and a criminal investigator in the prosecutor's office, under 42 U.S.C. § 1983. Ireland claims that defendants violated her Fourth and Fourteenth Amendment rights when they filed a criminal complaint against her, sought and issued a warrant for her arrest in connection with alleged improprieties in the City's direct payments to a County police officer. The district court granted summary judgment for all defendants on the basis of absolute and qualified immunity. Ireland appeals the entry of summary judgment for defendants and the denial of her motions for summary judgment and to compel discovery. For the reasons that follow, we affirm.

I. BACKGROUND

Billie M. Ireland, Mayor of the City of Rochester Hills, Michigan, brought this 42 U.S.C. § 1983 action against four Oakland County officials: Richard D. Kuhn, Oakland County Circuit Court Judge; Richard Thompson, Prosecuting Attorney for the County; Gary L. Tunis, Assistant Prosecuting Attorney; and John Meiers, a criminal investigator with the prosecutor's office. Ireland alleges violations of her Fourth and Fourteenth Amendment rights insofar as she asserts that the warrant for her arrest, sought and issued by defendants, lacked probable cause to arrest and was not issued by a proper magistrate judge after a judicial proceeding. First Amend. Compl.; J.A. at 21-27.

On October 5, 1993, Oakland County Circuit Court Judge Kuhn, then acting as Chief Judge, issued a warrant for Ireland's arrest based on allegations made in a criminal complaint that Ireland had participated in a scheme to misappropriate public funds, stemming from payments made by the City of Rochester Hills to Captain Gerard Carlin, a county law enforcement officer assigned to the Rochester Hills substation of the

Oakland County Sheriff's Department. Crim. Compl.; J.A. at 120-125.

Pursuant to a contractual arrangement, Oakland County provided law enforcement services to the City of Rochester Hills. *See* Agreement for Law Enforcement Servs.; J.A. at 369. The City paid the County for the overall provision of police services, and the County in turn compensated the individual officers rendering such services. The contract stated that the City would not be required to assume any liability for direct compensation to any County personnel, but apparently it did not forbid such direct payments. According to the contract, services beyond the scope of the contract were "available upon request by the local jurisdiction to be paid for at the established overtime rate." Agreement ¶ 4; J.A. at 370.

Carlin was appointed Captain of the Rochester Hills substation, a newly-created position, in January 1991. As Captain, he became ineligible for overtime pay according to Sheriff's Department rules. *See* Sheriff Nichols Deposition at 117; J.A. at 1475. Ireland alleges that her administrative assistant, Doris Keylon, obtained specific approval from a Sheriff's Department official, Dale Cunningham, for

the City to make payments directly to Carlin, and that "Mr. Cunningham knew very well what was going on." Ireland Deposition (Part II) at 106, 157-58; J.A. at 1262, 1313-14; *see also* Keylon Interview; J.A. at 683-84. In January 1991, the City began compensating Carlin for overtime services. In the ensuing two-year period, the City paid Carlin over $20,000. Ireland Deposition (Part 1) at 205-06; J.A. at 972-73.

In December 1992, after receiving an anonymous letter, the Sheriff's Department commenced an internal investigation of the City's payments to Carlin. Nichols Deposition at 49, 77; J.A. at 1458, 1465. Soon thereafter, the sheriff turned the investigation over to the Oakland County Prosecutor's Office, which subsequently decided to file criminal charges against Ireland, Carlin, and others. Thompson Deposition at 32-34; J.A. at 1533-34. With Thompson's approval, Tunis prepared an arrest warrant and a criminal complaint charging Ireland, Carlin, and Keylon with violating various state laws.[1] Tunis

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[1]Specifically, as recounted by the United States district court:

> The complaint included eight counts; counts one through six applied to [Ireland], Carlin, and Doris Keylon, while counts seven and eight named only Carlin. Count one alleged a conspiracy by public

Deposition at 17, 33; J.A. at 1569, 1573. On October 5, 1993, Tunis and Meiers presented the materials to Judge Kuhn in his chambers. Tunis Deposition at 59; J.A. at 1580. Meiers, who had assisted in the investigation, signed the complaint as the complaining witness. *Id.* Ireland alleges that no formal hearing was held, and that the complaint was not sworn to under oath. Judge Kuhn, however, testified at his deposition that he read the complaint, swore in the complainant, verified "that this was a true Complaint and what was in there was true," found probable cause on the basis of the complaint alone, and issued a

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officials to embezzle over $50. Count two alleged a conspiracy to commit the common-law offense of "misconduct in public office" through payment of city funds to Carlin. Count three alleged a conspiracy to use public funds for a purpose contrary to law. Counts four through six charged each individual with the offenses underlying the conspiracy charges in counts one through three. Finally, count seven charged Carlin with receipt of stolen property in excess of $100, and count eight charged Carlin with receiving additional compensation for duties for which he was already being paid by the Sheriff's Department. Counts two and five included fairly lengthy (and nearly identical) statements of facts, and count eight alleged that Carlin received additional compensation from the City of Rochester Hills. The remaining counts included essentially no supporting facts; rather, they stated the relevant provisions of the laws that allegedly were violated.

Ireland v. Tunis, 907 F. Supp. 1088, 1091 n.1 (E.D. Mich. 1995).

warrant for Ireland's arrest. Kuhn Deposition at 18-20; J.A. at 148-50. No record was made of the proceeding.[2] At their depositions, Tunis and Meiers testified in support of the judge's version of events. *See* Meiers Deposition at 127, 130, 143-44; J.A. at 1427-28, 1431; Tunis Deposition at 56, 59; J.A. at 1579-80.

Ireland and her co-defendants moved in state court to quash the arrest warrants. In response, Michigan District Court Judge Nelson issued an opinion finding that the procedure used to obtain the warrant violated the Fourth Amendment insofar as the complaints contained only legal conclusions without sufficient factual allegations to support such conclusions. Judge Nelson Opinion; J.A. at 211-215. To remedy the violation, Judge Nelson suppressed any evidence resulting from the arrests, but, recognizing the inherent safeguard of a preliminary examination, refused to

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[2]Ireland asserts that the issuance of an arrest warrant must take place on the record in the presence of a court reporter. We have reviewed the formal requirements for the issuance of an arrest warrant in Michigan, *see* MICH. COURT RULE 6.102; MICH. COMP. LAWS ANN. §§ 764.1-.1d, and find no such mandate. We note that had Judge Kuhn relied upon the "testimony of a sworn witness" in making his probable cause determination, that testimony would have to have been "adequately preserved to permit review." *See* MICH. COURT RULE 6.102(B).

dismiss the charges at that time. Judge Nelson Opinion; J.A. at 214. Following a preliminary examination, Judge Nelson dismissed all charges against Ireland for want of probable cause, a decision the prosecutors chose not to appeal.[3] *See* Tr. of Prelim. Exam. at 42; J.A. at 257; Thompson Deposition at 73; J.A. at 1543.

Ireland subsequently commenced the instant civil action, contending that the criminal complaint against her insufficiently stated a violation of any Michigan criminal law; that the warrant for her arrest was not obtained in a proper judicial proceeding because the complaint was not sworn to under oath and failed to establish probable cause, and because Judge Kuhn lacked authority under Michigan law to issue arrest warrants; and that her arrest was attributable to "impure and malicious" political motives of the prosecutors. First Amend. Compl.; J.A. at 23-25.

In two detailed and well-reasoned opinions, the United States district court granted summary judgment to all defendants. First, the district court

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[3]Judge Nelson likewise dismissed all charges against Keylon and most charges against Carlin. *See* Tr. of Prelim. Exam. at 40-42; J.A. at 255-57. For the sole remaining charge, Count Eight--retaining fees in violation of MICH. COMP. LAWS ANN. § 45.408 (West 1996), Carlin was tried and acquitted by a jury.

found Judge Kuhn absolutely immune from Ireland's suit. *Ireland v. Tunis*, 893 F. Supp. 724 (E.D. Mich. 1995). Without deciding the "seemingly basic" but apparently unsettled question of whether judges of Michigan's circuit courts maintain authority under Michigan law to issue arrest warrants, the district court found that, even if Judge Kuhn did act in excess of his authority when he issued the warrant for Ireland's arrest, he did not act in the clear absence of all jurisdiction. *Id.* at 729, 730. Based on Michigan's jurisdictional framework, Judge Kuhn's belief that he had authority to issue arrest warrants was reasonable. *Id.* at 730.

In a subsequent opinion, the United States district court granted summary judgment to the remaining defendants. *Ireland v. Tunis*, 907 F. Supp. 1088 (E.D. Mich. 1995). The court found that Prosecutors Thompson and Tunis were absolutely immune from Ireland's § 1983 suit for deciding to seek and for obtaining an arrest warrant, acts directly related to initiating prosecution. *Id.* at 1100. Meiers, however, performed only investigatory duties that were not protected by absolute immunity. *Id.* Nonetheless, the district court found that Meiers was entitled to qualified immunity for his

participation in the procurement of Ireland's arrest warrant because his actions were objectively reasonable and violated no clearly established law. *Id.* at 1102, 1106. Ireland timely appealed.

II. DISCUSSION

A. Standard of Review

We review a district court's grant of summary judgment de novo, making all reasonable inferences in favor of the nonmoving party to determine if a genuine issue of material fact exists. *Pusey v. City of Youngstown*, 11 F.3d 652, 655 (6th Cir. 1993) (quotation omitted), *cert. denied*, 512 U.S. 1237 (1994). "Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to summary judgment as a matter of law." *Id.*

B. Absolute Judicial Immunity

Ireland argues that the broad shield of absolute judicial immunity does not protect Judge Kuhn from liability for issuing the warrant for her arrest. Judges are generally absolutely immune from civil suits for money damages,

including § 1983 suits. *Mireles v. Waco*, 502 U.S. 9, 9 (1991); *Barnes v. Winchell*, 105 F.3d 1111, 1115 (6th Cir. 1997). Such far-reaching protection "is justified 'by a long-settled understanding that the independent and impartial exercise of judgment vital to the judiciary might be impaired by exposure to potential damages liability.'" *Barnes*, 105 F.3d at 1115 (quoting *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435 (1993)). Accordingly, absolute judicial immunity is overcome only in two situations:

> First, a judge is not immune from liability for nonjudicial actions, i.e., actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction.

Mireles, 502 U.S. at 11-12 (citations omitted); *see also Barnes*, 105 F.3d at 1116 (same).

Whether an action is judicial depends on the "'nature' and 'function' of the act, not the 'act itself.'" *Mireles*, 502 U.S. at 13 (quoting *Stump v. Sparkman*, 435 U.S. 349, 362 (1978)). This functional analysis typically turns on two factors set forth by the Supreme

Court in *Stump*. First, looking to the nature of the act, courts must determine "whether it is a function normally performed by a judge." *Stump*, 435 U.S. at 362. For this inquiry, rather than rigidly scrutinizing only the particular act in question, courts should "look to the particular act's relation to a general function normally performed by a judge." *Mireles*, 502 U.S. at 13. Second, regarding the expectations of the parties, courts must assess whether the parties dealt with the judge in his or her judicial capacity. *Stump*, 435 U.S. at 362.

Here, both factors indicate that Judge Kuhn's issuance of the arrest warrant was a judicial act. This court has already recognized that the issuance of an arrest warrant is a judicial act for judicial immunity purposes. *Foster v. Walsh*, 864 F.2d 416, 417-18 (6th Cir. 1988); *King v. Love*, 766 F.2d 962, 968 (6th Cir.) (although setting bond on an arrest warrant is a judicial act, the act of deliberately misleading the police officer who was to execute the warrant about the identity of the person sought was nonjudicial), *cert. denied*, 474 U.S. 971 (1985); *cf. Burns v. Reed*, 500 U.S. 478, 492 (1991) ("[T]he issuance of a search warrant is unquestionably a judicial act."). Thus, the judicial

nature of the act of issuing an arrest warrant cannot seriously be challenged.

We next consider Ireland's primary contention, that Judge Kuhn acted in complete absence of all jurisdiction and therefore is not immune from § 1983 liability. *See Mireles*, 502 U.S. at 12. With respect to this jurisdictional inquiry, the Supreme Court has instructed that:

> [T]he scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge. A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the "clear absence of all jurisdiction."

Stump, 435 U.S. at 356-57 (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1872)) (footnote omitted). If the matter upon which the judge acts is clearly outside the subject matter jurisdiction of the court over which the judge presides, the act is done in the clear absence of all jurisdiction. *King*, 766 F.2d at 965; *see Barnes*, 105 F.3d at 1122 ("Generally, where a court has some

subject matter jurisdiction, there is sufficient jurisdiction for immunity purposes."). By contrast, merely acting in excess of authority does not preclude immunity. *See Sevier v. Turner*, 742 F.2d 262, 271 (6th Cir. 1984). For example, a criminal court judge would be immune from liability for convicting a defendant of a nonexistent crime, an act taken in excess of jurisdiction, whereas a probate court judge would not be immune for trying a criminal case, an act for which the probate judge clearly lacked all subject matter jurisdiction. *Stump*, 435 U.S. at 357 n.7. As developed below, the present case, involving allegations that a judge of a court of general jurisdiction improperly issued an arrest warrant, more closely resembles the former scenario for which absolute immunity is mandated under governing precedent.

Michigan circuit courts are courts of general jurisdiction possessing original jurisdiction in all matters not prohibited by law. MICH. CONST. art. VI, §§ 1,13; MICH. COMP. LAWS ANN. §§ 600.151, 600.601, 600.605 (West 1996); *People v. Johnson*, 398 N.W.2d 219, 222 n.7 (Mich. 1986). "Circuit courts are therefore presumed to have jurisdiction unless the matter in question is specifically excluded by law." *People v. Loukas*, 304 N.W.2d 532, 534 (Mich. Ct. App. 1981).

We find no law that specifically proscribes the jurisdiction of a Michigan circuit court as to the issuance of arrest warrants. As codified in § 600.8511(b), Michigan law grants specific authority for a district court magistrate judge to issue arrest warrants. *See* MICH. COMP. LAWS ANN. § 600.8511(b) (West Supp. 1996). Nowhere, however, does this statute or any other imply that such authority lies exclusively with a magistrate judge. Presuming the contrary, the definition of a "magistrate" found in the Michigan Code of Criminal Procedure contains language relevant to our inquiry:

> This definition does not limit the power of a justice of the supreme court, a *circuit judge*, or a judge of a court of record having jurisdiction of criminal cases under this act, or deprive him or her of *the power to exercise, in his or her discretion, the authority of a magistrate*.

MICH. COMP. LAWS ANN. § 761.1(f) (West Supp. 1996) (emphases added). We recognize that this definitional statute cannot serve to confer jurisdiction on any court, should such specific grant of authority be necessary under Michigan's jurisdictional framework. Nonetheless,

we believe the statutory language plainly implies that, at least with respect to criminal cases, circuit judges have discretion to do that which a magistrate judge is empowered to do, including the authority to issue arrest warrants.

Ireland contends that a decision of the Court of Appeals of Michigan, *People v. Farmilo*, 358 N.W.2d 350 (Mich. Ct. App. 1984), conclusively demonstrates that Michigan circuit judges lack the discretionary power to entertain requests for arrest warrants because such warrants are required to issue at the district level. In *Farmilo*, an Oakland County Prosecutor requested that an Oakland County Circuit Judge issue an arrest warrant. The judge declined, believing that jurisdiction rested with the district court. The Court of Appeals of Michigan affirmed in a four-paragraph per curiam opinion, noting simply that district court magistrate judges are vested with jurisdiction to issue arrest warrants under § 600.8511(b), and that circuit courts ordinarily acquire jurisdiction in a criminal matter only after the case is bound over for trial by a district court. *Id.* at 351.

We agree with the United States district court's conclusion that *Farmilo* should not be read as prohibiting a Michigan state circuit judge from issuing

an arrest warrant. The issue in *Farmilo* concerned whether a circuit judge was *required* to issue an arrest warrant when requested to do so, and the Court of Appeals of Michigan upheld the judge's refusal to entertain the warrant request. Thus, the clear implication of *Farmilo*'s holding is that a circuit judge has discretion with respect to issuing, or not issuing, an arrest warrant, a position entirely consistent with § 761.1(f)'s recognition that a Michigan circuit judge has discretion to exercise the authority of a magistrate judge.

In this case, Judge Kuhn testified that chief judges of the Oakland County Circuit Court have a longstanding practice, going back at least twenty years, of issuing arrest warrants in special circumstances, such as when a politically sensitive matter is involved, when district judges are not available, or when crimes cross jurisdictions. Kuhn Deposition at 7-10; J.A. at 137-40. In particular, Judge Kuhn recalled that as Chief Judge he had issued many warrants, including an arrest warrant for the Vice Mayor of the City of Pontiac, J.A. at 135, and he knew of at least two chief judges before him who had similarly issued arrest warrants. J.A. at 138. Ireland presents no evidence to refute this asserted custom. Thus,

uncontroverted evidence, albeit self-serving,[4] indicates that the Chief Judge of the Oakland County Circuit Court traditionally issues arrest warrants in certain situations. Judge Kuhn, therefore, was not confronted with a request that was foreign to his office.

We are thus presented with a scenario where Michigan state circuit judges enjoy broad general jurisdiction limited only by specific exclusion at law; no law prohibits a circuit judge from issuing arrest warrants, rather the Michigan legislature impliedly recognizes that circuit judges have discretion to act as a magistrate judge and issue arrest warrants; the only case law on point merely confirms that circuit judges are not required to issue arrest warrants; and the defendant judge testified under oath that he and other chief judges have traditionally issued arrest warrants in special circumstances. We are guided by an analogous scenario in

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[4]Beyond the judge's self-serving testimony, we have found further support for the existence of this tradition. *See infra* Part II.C n.5 (discussing *Joseph v. Patterson*, 795 F.2d 549 (6th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987), where an Oakland County Circuit Judge had issued the arrest warrants at issue); Tunis Deposition at 50-52; J.A. at 1578 (testifying that tradition of taking warrants to chief judge for notorious cases or when district judges were unavailable had existed ever since he had been a prosecutor).

Stump, where there was likewise no state statute nor case law prohibiting a state circuit court, a court of general jurisdiction, from considering a petition for sterilization. *Stump*, 435 U.S. at 358. Because the court there was one of general jurisdiction, the lack of specific statutory authorization to approve the petition in question did not render the judge liable in damages. *Id.* at 359-60. Here, the Michigan circuit court is also vested with broad general jurisdiction such that, despite the lack of specific statutory authorization to issue arrest warrants, jurisdiction must be presumed because the matter in question has not been specifically proscribed by law.

Our analysis of the availability of absolute judicial immunity in the instant action is not constrained by the Michigan state district judge's finding that the procedure used to obtain the arrest warrant violated the Fourth Amendment. Specifically, the state judge found that the complaints before him contained "only legal conclusions without any factual allegations or information supporting those conclusions. Nor is the source of any information revealed." Judge Nelson Opinion; J.A. at 211. Regardless of whether we would so characterize the criminal complaint as completely lacking

in factual support, *see infra* Part II.D, this procedural flaw does not wholly deprive Judge Kuhn of his presumed jurisdiction to act upon the complaint. *Cf. Barnes*, 105 F.3d at 1123. The commission of "grave procedural errors" by a judge exercising his or her authority will not strip the judge of the shield of absolute judicial immunity. *See Stump*, 435 U.S. at 359. Moreover, we believe that this case demonstrates that "the judicial process is largely self-correcting: procedural rules, appeals, and the possibility of collateral challenges obviate the need for damages actions to prevent unjust results." *Mitchell v. Forsyth*, 472 U.S. 511, 522-23 (1985). The built-in procedural safeguards available to Ireland in the underlying criminal action, including those she utilized--a motion to quash an arrest warrant and a preliminary examination--served as appropriate checks on Judge Kuhn's exercise of his presumptive authority to issue an arrest warrant.

Recognizing the expansive scope of the jurisdictional inquiry contemplated in *Stump*, we cannot conclude that Judge Kuhn acted wholly outside his authority. Rather, we hold that Judge Kuhn's issuance of a warrant for Ireland's arrest constituted a judicial act within

the presumed jurisdiction of the Oakland County Circuit Court. Accordingly, Judge Kuhn is entitled to absolute judicial immunity from suit for Ireland's claims stemming from the issuance of the arrest warrant.

C. Absolute Prosecutorial Immunity

Absolute or "quasi-judicial" immunity derived from common-law immunity accorded to judges has been extended to prosecutors when the prosecutorial activity is "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 420, 430 (1976). The Supreme Court endorses a "functional" approach for determining whether an official is entitled to absolute immunity; we look to "the nature of the function performed, not the identity of the actor who performed it." *Forrester v. White*, 484 U.S. 219, 229 (1988); *see also Salyer v. Patrick*, 874 F.2d 374, 378 (6th Cir. 1989) ("Immunity rests not on status or title but on the function performed."). In our circuit, "precedent has established that 'the critical inquiry is how closely related is the prosecutor's challenged activity to his role as an advocate intimately associated with the

judicial phase of the criminal process.'" *Pusey v. City of Youngstown*, 11 F.3d 652, 658 (6th Cir. 1993), *cert. denied*, 512 U.S. 1237 (1994) (quoting *Joseph v. Patterson*, 795 F.2d 549, 554 (6th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987)).

Ireland ties the availability of absolute prosecutorial immunity in the instant action to the jurisdiction of the court issuing the arrest warrant, such that absolute immunity should not attach where a warrant is procured in a court lacking jurisdiction to issue the warrant. *See* Appellant's Br. at 33, 36. We have already held that Judge Kuhn issued the warrant for Ireland's arrest pursuant to at least a colorable claim of jurisdiction, sufficient for absolute judicial immunity purposes. We also believe this colorable claim of jurisdiction is sufficient for absolute prosecutorial immunity purposes. Thus, jurisdictional concerns aside, we must decide whether absolute prosecutorial immunity extends to the defendants' actions in the instant case.

Although in her complaint Ireland merges the roles defendants Thompson, Tunis, and Meiers played in her alleged constitutional deprivation, *see* First Amend. Compl. ¶¶ 19-22, 25; J.A. at 23-25, our review of the record reveals that

each defendant performed particular actions. Thompson, as the elected Prosecuting Attorney for the County, received informal reports on the status of the Carlin investigation, attended various staff meetings, concurred in the recommendations of his subordinates that charges should be filed against Ireland, reduced the number of specific counts charged against Ireland, and ultimately concurred in the decision to seek a warrant for Ireland's arrest. *See* Thompson Deposition at 85, 86, 115-17; J.A. at 1546, 1547, 1554. Tunis, one of two attorneys directly overseeing the investigation, reviewed documents and transcripts of witness interviews, met with investigators, conducted legal research, drafted and periodically updated the criminal complaint and arrest warrant, signed and authorized the complaint, and presented the materials to Judge Kuhn. *See* Tunis Deposition at 17, 33, 58; J.A. at 1569, 1573, 1580. Meiers, a non-attorney criminal investigator, conducted witness interviews, reviewed documents, prepared reports, appeared before Judge Kuhn, signed the complaint as the complaining witness, and swore that the contents of the complaint were true. *See* Meiers Deposition at 120, 127-28, 130; J.A. at 1425, 1427, 1428.

In *Imbler v. Pachtman*, 424 U.S. 409 (1976), the Supreme Court held that state prosecutors are absolutely immune from liability under § 1983 for initiating a criminal prosecution and presenting the state's case. *Id.* at 431. After observing that at common law prosecutors were immune from malicious prosecution suits, the Court reasoned that policy considerations warranted similar immunity from § 1983 suits. *Id.* at 424. Recognizing that retaliatory suits "could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate," the Court expressed concern that if a prosecutor was not afforded absolute immunity, the prosecutor's exercise of independent judgment would likely be compromised to the detriment of public trust and the effective functioning of the criminal justice system. *Id.* at 425-26. In addition to diverting the prosecutor's energy from "the pressing duty of enforcing the criminal law," these suits could often prove difficult to defend, imposing "unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials," and subjecting even the honest prosecutor to a

"substantial danger of liability." *Id.* Furthermore, judicial review and professional discipline serve as unique checks on prosecutorial abuse which reduce the need for private damages actions. *Id.* at 427, 429. "To be sure, [absolute] immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty," yet affording any less protection would "disserve the broader public interest" by preventing "vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system." *Id.* at 427-28. Thus, when a prosecutor's activities are "intimately associated with the judicial phase of the criminal process," absolute immunity applies "with full force." *Id.* at 430.

The Supreme Court later qualified its broad prescription by restricting the availability of absolute prosecutorial immunity to acts falling within a prosecutor's role as advocate for the state in the judicial process. *See Burns v. Reed*, 500 U.S. 478, 491 (1991). Absolute prosecutorial immunity is justified "only for actions that are connected with the prosecutor's role in judicial proceedings, not for every

litigation-inducing conduct." *Id.* at 494. A prosecutor was therefore absolutely immune from suit for soliciting false testimony from witnesses and participating in a probable cause hearing that led to the issuance of a search warrant, but not for giving legal advice to the police regarding the use of hypnosis as an investigative technique and the existence of probable cause to arrest. *Id.* at 487, 492, 496. For this latter type of prosecutorial activity, administrative or investigative acts unrelated to judicial proceedings, qualified immunity is all that is available. *See id.* at 494-95; *see also Bush v. Rauch*, 38 F.3d 842, 847 (6th Cir. 1994).

More recently, the Supreme Court again emphasized the functional tie between a prosecutor's conduct and the judicial process for purposes of the absolute prosecutorial immunity inquiry. "[A]cts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity," but "those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not."

Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993). With respect to investigative acts such as interviewing witnesses, the Court stated:

> There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.

Id. (quotation omitted). Accordingly, the prosecutors in *Buckley* were only entitled to qualified immunity for allegedly conspiring to fabricate evidence during the preliminary investigation of a crime, and for making false statements at a press conference. *Id.* at 275, 277.

Thus, as the doctrine has emerged, absolute prosecutorial immunity protects

only those acts falling within a prosecutor's role as advocate for the state and intimately associated with the judicial process, and not for administrative or investigative acts antecedent or extraneous to the judicial process. Investigative acts undertaken in direct preparation of judicial proceedings, including the professional evaluation of evidence, warrant absolute immunity, whereas other acts, such as the preliminary gathering of evidence that may ripen into a prosecution, are too attenuated to the judicial process to afford absolute protection. *See Buckley*, 509 U.S. at 273. We must decide whether the defendants' conduct in this case falls within the range of advocacy functions sufficiently related to the judicial process to warrant absolute prosecutorial immunity.

This circuit has had previous occasion to consider whether absolute immunity should extend to a prosecutor's decision to file a criminal complaint and seek an arrest warrant. The complaint in *Joseph v. Patterson*, 795 F.2d 549 (6th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987), alleged that Oakland County prosecutors and investigators employed by the prosecutor's office, some of whom are the same players in the instant action, entered into concerted action with the

police to bring false criminal charges against the Josephs and used coerced false statements to obtain arrest warrants, search warrants, and signatures on complaint forms from a state *Circuit Court* Judge.[5] *Id.* at 551. As in the case against Ireland, all criminal charges against the Josephs were dismissed upon preliminary examination in the district court. *Id.* at 552. Relying upon *Imbler*, the *Joseph* panel held that the prosecutors were protected by absolute immunity for "knowingly obtain[ing] issuance of criminal complaints and arrest warrants against the Josephs based on false, coerced statements." *Id.* at 555. "The decision to file a criminal complaint and seek issuance of an arrest warrant are quasi-judicial duties involved in 'initiating a prosecution.'" *Id.* As such, they are protected under *Imbler*, for "securing the person of the defendant is part of initiating a prosecution and should be

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[5]Although the parties do not cite this case as providing evidence that there is a custom of having circuit judges issue arrest warrants, *see supra* Part II.B, we find that it does lend credence to Judge Kuhn's testimony that this practice has indeed been occurring for some time in the Oakland County Circuit Court. Moreover, even though judicial immunity was not directly at issue in *Joseph*, whether it was proper for those prosecutors to seek warrants from a judge of a state circuit court, as opposed to district court, was apparently never called into question.

insulated."[6] *Id.* at 556. *See also Grant v. Hollenbach*, 870 F.2d 1135, 1139 (6th Cir. 1989) (holding prosecutor absolutely immune from suit for deciding to investigate and conspiring to present false charges to the grand jury).

Also at issue in *Joseph* was the appropriate level of immunity for investigators employed by the prosecutor's office. There we declared that:

> [A] nonjudicial officer who takes ministerial actions intimately related to the judicial process pursuant to the express direction and control of a prosecutor, who is directing the activity in fulfillment of a quasi-judicial responsibility, also has absolute immunity. . . . However, when the nonjudicial official undertakes action on his own initiative or when he carries out administrative or investigative functions of the prosecutor, he can only claim

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[6]*Joseph* further held that the preparation of and application for a search warrant fell within the gray area of immunity analysis and the panel remanded for further factual development. As the instant matter concerns solely an arrest warrant, we have no occasion to reconsider *Joseph*'s holding with respect to the prosecutor's procurement of a search warrant.

> the affirmative defense of qualified immunity. In these instances, both the public policy and common law rationale which favor absolute immunity, as well as the checks and safeguards inherent in the judicial process, are absent.

Joseph, 795 F.2d at 560. Thus, pursuant to *Joseph*'s instruction, investigators performing acts remote from the judicial process must rely on qualified immunity for protection from § 1983 liability. *Compare Davis v. Grusemeyer*, 996 F.2d 617, 632 (3rd Cir. 1993) (establishing general rule that "investigators for a prosecutor performing investigative work in connection with a criminal prosecution deserve the same absolute immunity as the prosecutor," although recognizing that conceivably "some aspects of an investigator's work for a prosecutor . . . would have so attenuated a link to the prosecution that immunity should not attach"); *Hill v. City of New York*, 45 F.3d 653, 660 (2d Cir. 1995) (declaring that employees of district attorney's office are entitled to same degree of immunity as assistant district attorney "for their activities while assisting with the investigation and prosecution").

If still sound law, *Joseph* controls the outcome in this case. Since *Joseph* predated *Burns* and *Buckley*, we have reconsidered its holding in light of the subsequent Supreme Court law. Upon consideration, we believe no post-*Joseph* Supreme Court or circuit law construing the boundaries of absolute prosecutorial immunity alters the essential teachings of *Joseph*. A prosecutor's decision to file a criminal complaint and seek an arrest warrant and the presentation of these materials to a judicial officer fall squarely within the aegis of absolute prosecutorial immunity. In this role, a prosecutor is unquestionably functioning as an advocate for the state in the judicial process, and absolute immunity is fully justified because the integrity of the judicial system depends in large part upon a prosecutor's ability to exercise independent judgment in deciding whether and against whom to bring criminal charges. *See Imbler*, 424 U.S. at 431; *Kulwicki v. Dawson*, 969 F.2d 1454, 1463 (3rd Cir. 1992) ("The decision to initiate a prosecution is at the core of a prosecutor's judicial role."). Presenting the charging documents to a judicial officer and procuring an arrest warrant must be considered part of the formal process of initiating a prosecution and securing the presence of

the accused at trial. *See Imbler*, 424 U.S. at 431; *cf. Malley v. Briggs*, 475 U.S. 335, 343 (1986) ("[T]he prosecutor's act in seeking an indictment is but the first step in the process of seeking a conviction," for which we shield the prosecutor because "any lesser immunity could impair the performance of a central actor in the judicial process." (footnote omitted)). Absolute prosecutorial immunity will likewise attach to administrative or investigative acts necessary for a prosecutor to initiate or maintain the criminal prosecution.[7]

Nonetheless, when a prosecutor or other official switches from presenting the charging document to vouching personally for the truth of the contents of the document, we believe the protection afforded by absolute immunity must give way to a qualified immunity inquiry.[8] *See Kohl v. Casson*, 5 F.3d

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[7]Of course, as noted above, not all investigative acts undertaken by a prosecutor will be absolutely protected. Conducting a preliminary investigation is generally removed from a prosecutor's role in a judicial proceeding; "such investigations take place outside the adversarial arena with its attendant safeguards that provide real and immediate checks to abusive practices." *Auriemma v. Montgomery*, 860 F.2d 273, 278 (7th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989).

[8]We recognize that the question of whether absolute immunity extends to a prosecutor who allegedly made false statements in an affidavit supporting an application for an arrest warrant

1141, 1146 (8th Cir. 1993); *but see Roberts v. Kling*, 104 F.3d 316, 319 (10th Cir. 1997) (holding that action of investigator for district attorney's office in swearing out a complaint was prosecutorial in nature and entitled to absolute immunity). Absolute immunity at common law did not extend to complaining witnesses who "set the wheels of government in motion by instigating a legal action." *Wyatt v. Cole*, 504 U.S. 158, 164-65 (1992); *see also Malley*, 475 U.S. at 340-41, 342 ("We do not find a comparable [common-law] tradition of absolute immunity for one whose complaint causes a warrant to issue"; "the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause." (footnote omitted)). In *Malley*, the Supreme Court observed that the action of an "officer applying for a warrant . . . while a vital part of the administration of criminal justice, is further removed from the judicial phase of criminal proceedings than the act of a prosecutor

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may be resolved by the Supreme Court in reviewing *Fletcher v. Kalina*, 93 F.3d 653 (9th Cir. 1996) (denying absolute immunity protection to prosecutor's actions in preparing declaration in support of arrest warrant), *cert. granted*, --- U.S. ----, 117 S. Ct. 1079 (1997).

in seeking an indictment." *Malley*, 475 U.S. at 342-43. For these reasons, we believe that the only level of protection from suit that is potentially available when an official vouches for the truth of the contents of a criminal complaint is qualified immunity.

Applying the above principles to the defendants' actions in this case, we hold that Prosecutors Thompson and Tunis are entitled to absolute prosecutorial immunity for deciding to file a criminal complaint against Ireland, authorizing and preparing the complaint, seeking a warrant for her arrest, and, in the case of Tunis, presenting the charging documents to the judge. These were advocacy functions intimately associated with the judicial phase of the criminal process. Ireland does not contend that her alleged constitutional deprivation arose from the prosecutors' investigative activities undertaken antecedent to the decision to file criminal charges, nor does she contend that Thompson and Tunis acted outside their authority or otherwise beyond her criminal prosecution. That Ireland ascribes impure and malicious motives to the prosecutors is of no consequence, for absolute immunity provides complete protection from judicial scrutiny of the motives for the prosecutors' actions.

See Joseph, 795 F.2d at 557; *Schloss v. Bouse*, 876 F.2d 287, 291 (2d Cir. 1989). Accordingly, the United States district court appropriately granted summary judgment to the prosecuting attorneys on the basis of their absolute prosecutorial immunity from Ireland's suit.

D. Qualified Immunity for Swearing to the Complaint

The crux of Ireland's claim against investigator Meiers is that he vouched for the truth of the contents of the criminal complaint in front of a judicial officer.[9] For this function, any immunity protection available to him would be qualified, not absolute. An investigator in the prosecutor's office who provides the factual basis for criminal charges performs a function virtually identical to the police officer in *Malley*; thus, the immunity that protects the two actors should be the

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[9]Ireland does not challenge Meiers's actions in the course of his investigation, only his conduct before the judge in signing and swearing to the complaint. Furthermore, the complained-of actions in the instant case were all conducted before Ireland's criminal prosecution formally began; we therefore are not asked to determine the appropriate level of immunity for activities of an investigator in the prosecutor's office once prosecution has ensued.

same.[10] Government officials acting in their official capacities are not subject to individual damages liability "if their actions did not 'violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Greene v. Reeves*, 80 F.3d 1101, 1104 (6th Cir. 1996) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Greene*, 80 F.3d at 1104 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). According to Ireland, by presenting the complaint to a circuit court judge, and by signing and swearing to a complaint that plainly would not support probable

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[10]We reject the holding of a recent Tenth Circuit case that an investigator for a district attorney's office was absolutely immune from suit for swearing out a criminal complaint before a magistrate judge, and obtaining an arrest warrant, on the ground that the investigator's actions were prosecutorial in nature. *See Roberts v. Kling*, 104 F.3d 316, 319, 320 (10th Cir. 1997). The *Roberts* court was unpersuaded that the investigator's actions were analogous to those of the police officer in *Malley*. *Id.* at 321-22. Unlike the court in *Roberts*, we believe Meiers's actions are comparable to those of the police officer in *Malley* for immunity purposes; both actors essentially vouched for the truth of the contents of a complaint that caused an arrest warrant to issue, based upon evidence uncovered in an investigation. *See Kohl v. Casson*, 5 F.3d 1141, 1146 (8th Cir. 1993) (observing that prosecutor who, of his own accord, vouches for the truth of the arrest warrant affidavits is analogous to police officer in *Malley*).

cause, Meiers acted unreasonably and violated her constitutional rights.[11]

In the context of arrest warrants, the Supreme Court affords officials broad qualified immunity protection. *See Greene*, 80 F.3d at 1104; *Malley*, 475 U.S. at 341 (recognizing that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."). In *Malley*, the plaintiffs alleged that a police officer caused them to be arrested unconstitutionally by presenting to a judge a complaint and supporting affidavit that failed to establish probable cause. *Malley*, 475 U.S. at 337. The Court subscribed to an "objective reasonableness" test: "[o]nly where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable will the shield of immunity be lost." *Id.* at 344-45 (citation omitted).

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[11]Ireland's assertion that Meiers presented the complaint to a circuit court judge lacking jurisdiction to issue arrest warrants does not survive our analysis of absolute judicial and prosecutorial immunity. Moreover, we agree with the United States district court's finding that "for purposes of qualified immunity, even if Judge Kuhn lacked the power to issue warrants, Defendant Meiers would be entitled to rely on longstanding practice to the contrary to establish the reasonableness of seeking a warrant from Judge Kuhn." *Ireland*, 907 F. Supp. at 1103 n.10.

This "objective reasonableness" test is appropriate for determining whether in the instant action Meiers is immune from suit, for it was Meiers's complaint that caused Ireland's allegedly unconstitutional warrant to issue. In such a case, Meiers "will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Id.* at 341. "[P]robable cause determinations, even if wrong, are not actionable as long as such determinations pass the test of reasonableness." *Jeffers v. Heavrin*, 10 F.3d 380, 381 (6th Cir. 1993). Thus the proper inquiry, as framed by the district court below, is whether a reasonably competent investigator armed with Meiers's knowledge could have acted as Meiers did.

We agree with the United States district court that, given Meiers's knowledge at the time he swore to the complaint, reasonable officers could disagree as to whether there was sufficient probable cause to justify obtaining a warrant for Ireland's arrest. *See Ireland*, 907 F. Supp. at 1103. As found by the United States district court

and supported by the record, Meiers was part of the team investigating the City's payments to Carlin, he personally conducted a substantial number of interviews, and he reviewed numerous documents. Presumably, then, Meiers knew at the time he swore to the complaint that Carlin had received payments directly from the City, that Ireland herself signed Carlin's overtime slips, that the budget submitted by Ireland did not advise the City Council of the payments, and that there was a dispute as to whether the Sheriff's Department had authorized the payments. *Ireland*, 907 F. Supp. at 1103. In a capsulized statement, Meiers himself testified that he believed unlawful activity had occurred because "Mayor Billie Ireland and Doris Keylon were aware of the fact that Gerard Carlin was not eligible to receive overtime as a Captain. Yet, they provided additional payment for him anyway knowing that." Meiers Deposition at 142; J.A. at 1431. Although the factual allegations contained in the complaint were limited to two counts,[12]

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[12]Although the Michigan state district court found that the criminal complaint was constitutionally deficient in factual support, our task in this qualified immunity determination is not to determine whether probable cause in fact existed, but rather to determine whether "officers of reasonable competence could disagree" on the existence of probable cause.

the United States district court did not find the criminal complaint completely devoid of factual support for a finding of probable cause:

> [T]he facts provided in the complaint, although not included under each individual count, appear in their totality to lay a sufficient foundation for the claim that [Ireland] paid city funds to Captain Carlin without proper authorization from the [City

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Malley, 475 U.S. at 341. Ireland has not established that a reasonable officer should have known that probable cause was lacking when the complaint failed to restate facts under each individual count, where factual support on the face of the complaint arguably laid the foundation for all the charges. *Compare Illinois v. Gates*, 462 U.S. 213, 239 (1983) ("Sufficient information must be presented to the magistrate to allow that official to determine probable cause."). The United States district court observed that Ireland did not challenge "[d]efendants' assertion that the complaint in question fully complied with the requirements of the applicable Michigan court rules and statutes." *Ireland*, 907 F. Supp. at 1104; *see* MICH. COURT RULE 6.101 ("The complaint must include the *substance* of the accusation.") (emphasis added). Furthermore, Meiers was armed with knowledge from his investigation, going beyond the facts alleged in the complaint, about which a judge could inquire in making the probable cause determination. Here, however, Judge Kuhn found the complaint alone sufficient to establish probable cause to issue the arrest warrant. *Cf. Greene*, 80 F.3d at 1107 (recognizing that the issuance of an arrest warrant by a state judge serves as a factor in an objective reasonableness inquiry). We cannot conclude that the alleged factual deficiencies in the complaint render Meiers's actions in the instant case unreasonable.

> Council] . . . in violation of a Michigan statute dictating how deputy sheriffs are to be paid.

Ireland, 907 F. Supp. at 1104. Taking into consideration Michigan law requiring deputy sheriffs to be paid by the counties for which they work, *see* MICH. COMP. LAWS ANN. §§ 45.401-08 (West 1996), we believe the United States district court properly concluded that a reasonably competent officer could have found that the complaint adequately stated probable cause to arrest Ireland.

The Michigan state district judge faced with the task of determining whether at the preliminary examination the prosecutor had established probable cause to go forward with the charges concluded after four days of testimony that "certainly it was a most difficult case," but in the end "the facts did not fit the . . . charges." Tr. of Prelim. Exam. at 7-8, 13; J.A. at 222-23, 228. This finding by the state court does not necessarily mean that probable cause to make the initial arrest was lacking, but only demonstrates that after hearing the government's case as presented over the four day hearing, the judge was unconvinced that the case should continue. *Cf. Marx v. Gumbinner*, 905 F.2d 1503, 1507 (11th Cir. 1990) ("That a

defendant is subsequently acquitted or charges are dropped against the defendant is of no consequence in determining the validity of the arrest itself.").

Under the circumstances before us, we cannot characterize the complaint to which Meiers swore as "so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *See Malley*, 475 U.S. at 345. Accordingly, because Meiers's actions in swearing to the complaint were objectively reasonable and violated no clearly established law, we hold that Meiers is entitled to qualified immunity under the *Malley* formulation.

III. CONCLUSION

In sum, Judge Kuhn issued the warrant for Ireland's arrest in his judicial capacity and pursuant to a colorable claim of jurisdiction sufficient to shield him from § 1983 liability in the instant action; Prosecutors Thompson and Tunis are absolutely immune for deciding to file a criminal complaint against Ireland, preparing the complaint, seeking an arrest warrant, and presenting the materials to Judge Kuhn, for they were functioning as advocates for the state

and performing actions intimately associated with the judicial process; and investigator Meiers, who vouched for the truth of the contents of the complaint, is entitled to qualified immunity because his involvement was objectively reasonable and violated no clearly established law. Therefore we **AFFIRM** the district court's orders granting summary judgment to all defendants.[13]

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[13]Given our holding that the district court correctly found that immunity bars Ireland's claims, Ireland's motions for summary judgment and to compel discovery were appropriately denied.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
AT THE SOUTHERN DIVISION

ORDER AND OPINION
FOR CIVIL CASE NO. 94-CV-74931-DT
ENTERED JULY 13, 1995
AND AUGUST 29, 1995

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BILLIE M. IRELAND, *Plaintiff,*	)	No.94-CV-74931-DT
vs.	)	Hon. Gerald E.Rosen
GARY L. TUNIS, RICHARD THOMPSON, JOHN MEIERS and RICHARD D. KUHN, *Defendants.*	)	

OPINION AND ORDER REGARDING DEFENDANT KUHN'S MOTIONS FOR SUMMARY JUDGMENT AND RULE 11 SANCTIONS

At a session of said Court, held in the U.S Courthouse, Detroit, Michigan on July 13, 1995.

PRESENT: Honorable Gerald E. Rosen
United States District Judge

I. INTRODUCTION

Plaintiff Billie M. Ireland, Mayor of the City of Rochester Hills since 1985, brought this action against Defendants Gary L. Tunis, Richard Thompson, John Meiers, and Richard D. Kuhn on December 8, 1994. Defendants Tunis, Thompson and Meiers are, respectively, an Assistant Prosecuting Attorney for Oakland County, the Oakland County Prosecutor (an elected official), and an investigator for the Prosecutor's office. Defendant Richard D. Kuhn (also elected) is a Circuit Court Judge for Oakland County. Plaintiff brought her claims pursuant to 42 U.S.C. § 1983, alleging violations of her Fourth and Fourteenth Amendment rights by all Defendants.

After submitting to a deposition, Defendant Kuhn filed motions for summary judgment and Rule 11 sanctions on April 25, 1995. Plaintiff responded on May 4, and Kuhn replied on June 5. Kuhn argues that he is protected from suit by absolute judicial immunity, and seeks dismissal of the claims against him. In addition, he asks this Court to impose sanctions, pursuant to Federal Rule of Civil Procedure 11, against Plaintiff and/or her attorney for Plaintiff's

pursuit of an allegedly frivolous claim. After reviewing the papers filed by the parties and the arguments made by their counsel at a hearing held on June 20, 1995, the Court is now prepared to rule on Defendant Kuhn's motions. This memorandum opinion and order sets forth that ruling.

II. FACTUAL BACKGROUND

On October 5, 1993, Defendant Kuhn, who was at that time the Chief Judge of the Oakland County Circuit Court,[1] signed an arrest warrant presented to him by Defendant Tunis. The supporting complaint accused Plaintiff, in essence, of a scheme to misappropriate public funds. The following day, Plaintiff surrendered to authorities. Subsequently, a Michigan district court judge found the warrant to have been issued without probable cause, and, after a preliminary hearing, dismissed all charges against Plaintiff. In her complaint, Plaintiff alleges that Kuhn issued the warrant "in a non-judicial proceeding during which no

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[1]The position of Chief Judge is a two-year term. Judges may serve more than one term, but the terms may not be consecutive. Defendant Kuhn was serving the second year of his third term as Chief Judge at the time that the warrant against Plaintiff was issued.

finding was made as to probable cause. ." (Complaint, 23).

In his deposition, Kuhn indicated that he had no personal relationship with any of his co-defendants, and had no animus towards Plaintiff. When Defendant Tunis presented him with the complaint, he swore Tunis in and questioned him about the complaint's truthfulness. He then examined the complaint for probable cause, and concluded that it was present. No record was made of the proceeding.

Normally, in Michigan, arrest warrants are issued by district court judges. However, Kuhn testified that the Chief Judges of the Oakland County Circuit Court have a long-standing practice, of at least 20 years duration, of issuing arrest warrants (1) if no district court judge is available, (2) "if it was a political situation and they [the prosecutor] wanted to keep some confidentiality until it was done," (Kuhn Deposition, p. 8), and (3) if the alleged crimes occurred in more than one district. Kuhn testified that he had issued many warrants during his tenure as Chief Judge.

III. ANALYSIS

A. THE STANDARDS GOVERNING CONSIDERATION OF A MOTION FOR SUMMARY JUDGMENT.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

Three 1986 Supreme Court decisions -- Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348 (1986), Anderson v. Liberty Lobby, Inc., 477 U. S. 242, 106 S. Ct. 2505 (1986), and Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986) -- ushered in a "new era" in the standards of review for a summary judgment motion. These cases, in the aggregate, lowered the movant's burden on a summary judgment motion.[2] According to the Celotex Court:

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[2] "Taken together the three cases signal to the lower courts that summary judgment can be relied upon more so than in the past to weed out frivolous lawsuits and avoid wasteful trials." 10A Charles A. Wright et al., Federal Practice & Procedure, § 2727, at 35 (Supp. 1994).

> In our view, the plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof.

Celotex, 106 S. Ct. at 2552.

After reviewing the above trilogy, the Sixth Circuit established a series of principles to be applied to motions for summary judgment:

[*] Cases involving state of mind issues are not necessarily inappropriate for summary judgment.

[*] The movant must meet the initial burden of showing "the absence of a genuine issue of material fact" as to an essential element of the non-movant's case.

[*] This burden may be met by pointing out to the court that the respondent, having had sufficient opportunity for

discovery, has no evidence to support an essential element of his or her case.

[*] The respondent cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must "present affirmative evidence in order to defeat a properly supported motion for summary judgment."

[*] The trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact.

[*] The trial court has more discretion than in the "old era" in evaluating the respondent's evidence. The respondent must "do more than simply show that there is some metaphysical doubt as to the material facts." Further, "[w]here the record taken as a whole could not lead a rational trier of fact to find" for the respondent, the motion should be granted. The trial court has at least some discretion to

> determine whether the respondent's claim is "implausible."

See Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479-80 (6th Cir. 1989) (footnotes with citations omitted). The Court will apply the above principles in deciding Defendants' motion for summary judgment.

B. DEFENDANT KUHN IS ENTITLED TO JUDICIAL IMMUNITY.

Judicial immunity attaches only to actions undertaken in a judicial capacity. Forrester v. White, 484 U.S. 219, 227-229 (1988). In determining whether an action is "judicial," this Court must consider whether it is a "function normally performed by a judge." Stump v. Sparkman, 435 U.S. 349, 362 (1978). However, even if the action is judicial, immunity does not attach if it was taken in '''clear absence of all jurisdiction.'" Id. at 357 (quoting Bradley v. Fisher, 13 Wall. 335, 351, 20 L.Ed. 646 (1872)).

Issuance of an arrest warrant clearly is a "function normally performed by a judge." See Foster v. Walsh, 864 F.2d 416, 417-18 (6th Cir. 1988)

(issuance of an arrest warrant, even when non-discretionary, is a judicial function). In spite of this, Plaintiff argues that Judge Kuhn's failure to follow proper procedures renders his issuance of the warrant against her a nonjudicial act. Plaintiff relies, in part, on an Oregon case, Utley v. Independence, 402 P.2d 91 (Oregon 1964), in which the Oregon Supreme Court refused to extend judicial immunity to a part-time judge who had issued an arrest warrant in the absence of a sworn complaint. According to Plaintiff, at the time Judge Kuhn "signed this arrest warrant, he had no case pending in front of him in which the plaintiff was involved, no case in the circuit court was started as a result of the issuance of this warrant, and the warrant was not a ruling on any case pending in his court nor an order disposing of the rights of parties in any adversary matter." (Plaintiff's Brief, p. 13).

Plaintiff's argument that the circumstances surrounding Judge Kuhn's issuance of the warrant against her were improper goes more to the second component of the Stump test -- whether or not Judge Kuhn had jurisdiction to issue the warrant. Analysis of the two components should not be confused.

Whether a particular act is judicial in nature must be considered separately from the question of jurisdiction. Issuance of an arrest warrant is clearly a judicial act.

The closer question is whether or not Judge Kuhn was acting within his jurisdiction when he issued the warrant for the Plaintiff's arrest. Relying on Michigan case law and statutes, Plaintiff argues that he was not. In particular, Plaintiff directs the Court to People v. Farmilo, 137 Mich.App. 378, 358 N.W.2d 350 (1984). In Farmilo, the Oakland County Prosecutor appealed a decision of the Oakland County Circuit Court denying his request that the judge in that case hear witnesses swear to a complaint and issue an arrest warrant. The judge found "that jurisdiction rested with the district court to hear the complaint and issue a warrant." Id. at 351.

The Michigan Court of Appeals affirmed, noting that, pursuant to M.C.L. § 600.8511(b), "[d]istrict court magistrates are vested with jurisdiction to issue warrants for the arrest of a person upon the written authorization of the prosecuting or municipal attorney." Furthermore, M.C.L. § 600.8311(a) confers on district courts jurisdiction to try

certain misdemeanor charges, and to conduct preliminary examinations for all other misdemeanors and felonies. Finally, the court noted that circuit court jurisdiction in criminal matters is limited:

> Except in cases brought before the circuit court by indictment or appeal from a lower court, the jurisdiction of the circuit court in criminal cases is limited to the crime or crimes included in the return of the examining magistrate. The circuit court gains jurisdiction over a defendant charged with a criminal offense triable in circuit court upon the filing of a return by the examining magistrate showing that the defendant waived preliminary examination, or that a preliminary examination was had and the defendant was properly bound over for trial.

Ibid. Numerous other Michigan cases have held that circuit courts acquire jurisdiction in criminal matters only after the case is bound over for trial by a district court. See, e.g., People v.

Curtis, 389 Mich. 698, 707, 209 N.W.2d 243 (1973); Genesee Prosecutor v. Judge, 391 Mich. 115, 119 , 215 N.W.2d 145 (1974); People v. Johnson, 427 Mich. 98, 106 n.7, 398 N.W.2d 219 (1986).

However, Chapter 83 of Michigan's Revised Judicature Act, M.C.L. §§ 600.8301 through 600.8396, describes the limited jurisdiction and powers conferred on Michigan's district courts:

> The district court shall have jurisdiction of:
> (a) Misdemeanors punishable by fine or imprisonment not exceeding 1 year, or both.
> (b) Ordinance and charter violations punishable by a fine or imprisonment, or both.
> (c) Arraignments, the fixing of bail and the accepting of bonds.
> (d) Preliminary examinations in all felony cases and misdemeanor cases not cognizable by

the district court.

M.C.L. § 600.8311. In contrast, the Act confers broad jurisdiction on circuit courts:

> Circuit courts have the power and jurisdiction:
> (1) possessed by courts of record at the common law, as altered by the constitution and laws of this state and the rules of the supreme court, and
> (2) possessed by courts and judges in chancery in England on March 1, 1847, as altered by the constitution and laws of this state and the rules of the supreme court, and
> (3) prescribed by rule of the supreme court.

M.C.L. § 600.603. The Michigan Constitution, Art. 6, § 13 (1963), provides that the "circuit court shall have original jurisdiction in all matters

not prohibited by law." "Circuit courts are therefore presumed to have jurisdiction unless the matter in question is specifically excluded by law." People v. Loukas, 304 N.W.2d 532, 534, 104 Mich.App. 204 (1981). The Revised Judicature Act does not specifically vest district courts with jurisdiction to issue arrest warrants. However, chapter 85 of the Act discusses the powers and duties of district court magistrates, who are appointed by district court judges, and specifically mentions arrest warrants. It states:

> A district court magistrate shall have the following jurisdiction and duties:
>
> (a) To arraign and sentence upon pleas of guilty or nolo contendere [for violations of certain acts] . . .
>
> (b) To issue warrants for the arrest of a person upon the written authorization of the prosecuting or municipal attorney..
>
> (c) To fix bail and accept bond in all cases.

(d) To issue search warrants, when authorized to do so by a district court judge.

M.C.L. § 600.8511.

Finally, Michigan's Code of Criminal Procedure describes when and how arrest warrants may be issued:

(1) A magistrate shall issue a warrant upon presentation of a proper complaint alleging the commission of an offense and a finding of reasonable cause to believe that the individual accused in the complaint committed that offense. The complaint shall be sworn to before a magistrate or clerk.

M.C.L. § 764.1a.

"Magistrate" includes judges of the recorder's court of the city of Detroit . . .; judges of the district court; and judges of municipal courts. Magistrate does not include district court magistrates,

> except that a district court magistrate may exercise the powers, jurisdiction, and duties of a magistrate if specifically provided in . . . the revised judicature act . . . . This definition shall not be construed as limiting the power of justices of the supreme court, circuit judges, and judges of courts of record having jurisdiction of criminal cases under this act or depriving them of the Dower to exercise in their discretion the authority of magistrates.

M.C.L. § 761.1(f) (emphasis added).

Putting the Farmilo holding aside, Plaintiff's argument that circuit courts do not have jurisdiction to issue arrest warrants seems without merit. Although the statutes and cases noted above vest initial jurisdiction over criminal matters in the district courts, and give district court magistrates authority to issue arrest warrants, they do not specifically indicate that circuit court judges may not issue arrest warrants. The Code of Criminal Procedure, § 764.1a, arguably restricts authority to issue warrants to "magistrates," which by

definition does not include circuit court judges. However, that definition may "not be construed as limiting the power of... circuit judges. . . having jurisdiction of criminal cases under this act or depriving them of the power to exercise in their discretion the authority of magistrates."[3] Finally, given the broad grant of general jurisdiction to circuit courts in Michigan, absent a specific indication that circuit court judges do not have jurisdiction to issue warrants, jurisdiction must be presumed. See Loukas, supra.[4]

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[3]At the oral hearing on this matter, Plaintiff argued that this exception contained in the definition of "magistrate" does not authorize a circuit court judge to exercise the powers of a magistrate if the judge does not otherwise have jurisdiction over the matter. However, this interpretation of M.C.L. § 761.1(f) improperly extends the modifying phrase "having jurisdiction of criminal cases under this act." The statute lists two situations in which the authority of circuit court judges should not be considered impaired. The quoted phrase concerns only the first. It does not modify the second phrase -- "depriving them of the power to exercise in their discretion the authority of magistrates."

[4]Judge Kuhn also relies on language contained in M.C.L. § 600.8317, which states:

> The district court has the same power to issue warrants; subpoena witnesses; and require the production of books, papers, records, documents, and other evidence; and to punish for contempt as the circuit court now has or may hereafter have. . . .

In contrast, Farmilo seems to indicate that circuit court judges may not issue arrest warrants. Judge Kuhn argues that Farmilo is distinguishable from the facts of this case in that the underlying criminal charges in that case were misdemeanors, as opposed to the felony charges involved here.[5] Furthermore, the circuit court judge who refused to issue a warrant was not the Chief Judge. According to Kuhn, "[t]he Court of Appeals did not hold, nor have they ever held, that a Chief Judge of a Circuit Court who issues an arrest warrant on a felony charge does so in the complete absence of all jurisdiction." (Defendant's Reply Brief, p. 3). Perhaps more significantly, although Farmilo does

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According to Kuhn, this implies that circuit court judges also have authority to issue arrest warrants.

[5]Farmilo was charged with indecent exposure in violation of M.C.L. § 750.335a, and with being a sexually delinquent person in violation of M.C.L. § 750.10a. Indecent exposure is clearly a misdemeanor under Michigan law. At the oral hearing on this matter, Plaintiff argued that Farmilo had been charged with a felony. Whether or not sexual delinquency is a felony or misdemeanor is unclear on the face of the statute. Because the Court finds this distinction, if any, between the facts of Farmilo and this case unimportant to a resolution of the instant case, the Court need not resolve this dispute.

not rely on this, that case involved a judge's refusal to accept jurisdiction and issue a warrant. Nothing indicates that circuit court judges must entertain requests for arrest warrants. Indeed, § 761.1(f) indicates that they have discretion to act as magistrates, implying that they also have discretion to refuse to do so.

At the oral hearing on this matter, Plaintiff's counsel strenuously argued that the holding of Farmilo is clear -- circuit court judges have no authority to issue arrest warrants. Ordinarily, this Court would give considerable, if not controlling, weight to the decision of a state appellate court on a question of state law. However, in this case, the decision of the Michigan Court of Appeals not only stands alone, but arguably is contradicted by Michigan statutes.

But, although an interesting -- and seemingly basic -- question of Michigan jurisdictional jurisprudence, the issue of whether or not the judges of Michigan's circuit courts have authority under Michigan law to issue arrest warrants is one which this Court need not resolve. In order to be deprived of judicial immunity Judge Kuhn must have acted in "clear absence of all

jurisdiction." Stump, supra, at 356. In Stump, an Indiana Judge granted an ex parte petition by the plaintiff's mother to have her daughter sterilized. At the time, the plaintiff was fifteen years of age, and allegedly mildly retarded. The Court of Appeals for the Seventh Circuit concluded that the judge had not acted within his jurisdiction when he granted the petition, and therefore was not entitled to absolute judicial immunity. The Supreme Court disagreed, stating:

> A judge well not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the "clear absence of all jurisdiction." 13 Wall., at 351.

Id. at 356.

In a footnote, the Court discussed Bradley, supra, from which the language in quotation marks was taken:

> In Bradley, the Court illustrated the distinction between lack of jurisdiction

> and excess of jurisdiction with the following examples: if a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune. Id., at 352.

Stump, at 357 n. 7.

The instant case is distinguishable from other cases cited by Plaintiff in which judicial immunity was found lacking. For example, in Forrester v. White, 484 U.S. 219 (1988), the judge was not immune from liability for his demotion of a probation officer. The demotion was an administrative, rather than a judicial, act. Likewise, in Morrison v. Lipscomb, 877 F.2d 463 (6th Cir. 1989), a judge who, acting in his administrative capacity as chief judge, issued a moratorium on evictions during the holiday season was not absolutely

immune from the claims of an aggrieved landlord. In contrast, in Mireles v. Waco, 502 U.S. 9, 112 S.Ct. 286 (1991), the Supreme Court protected a judge from liability for his order allegedly requiring excessive force to be used to transport an attorney into his courtroom. The action was "taken in the very aid of the judge's jurisdiction over a matter before him". 112 S.Ct. at 289.

Even if Judge Kuhn did act in excess of his authority, he did not act in the "clear absence of all jurisdiction." In light of the long-standing practice of the Chief Judges of Oakland County, the broad jurisdiction given by the Michigan legislature to its circuit courts, and statutes that at least imply that circuit court judges may issue arrest warrants, Judge Kuhn's belief that he had authority to issue an arrest warrant was reasonable.[6] Thus, even if his action was outside the scope of his authority as a circuit court judge, it was more like the action of judge who convicts a criminal of a non-existent crime, than that of a probate judge who tries a criminal case.

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[6]Plaintiff presented no evidence to contradict Judge Kuhn's sworn deposition testimony that he acted without malice.

In short, Judge Kuhn clearly acted in a judicial capacity when he issued the arrest warrant. Although it is unclear if he acted in excess of his authority, it is clear that he did not act in "complete absence of all jurisdiction." [7]

C. SANCTIONS SHOULD NOT BE IMPOSED ON PLAINTIFF.

Defendant Kuhn asks this Court to impose sanctions on Plaintiff for her allegedly frivolous claims against him. After considering the arguments made by the parties, and in light of the support for Plaintiff's case found in Farmilo, supra, this Court finds that Plaintiff's complaint against Kuhn was not frivolous. Therefore, sanctions will not be imposed.

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[7]Defendant Kuhn also argues that, even if he were not protected by judicial immunity, Plaintiff could not make out a § 1983 claim against him. According to Kuhn, some level of scienter is required by § 1983. See Daniels v. Williams, 474 U.S. 327, 33031 (1986) (simple negligence will not support a § 1983 claim for relief). Nothing in the record indicates that Kuhn conspired with the others, or acted with animus towards Plaintiff. Given, this Court's conclusion that Judge Kuhn is protected by judicial immunity, however, this issue need not be resolved.

IV. CONCLUSION

For the foregoing reasons,

NOW, THEREFORE, IT IS HEREBY ORDERED that Defendant Kuhn's Motion for Summary Judgment be GRANTED, and that Defendant Kuhn's Motion for Rule 11 Sanctions be DENIED.

/s/ Gerald E. Rosen
U.S. District Court Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BILLIE M. IRELAND, *Plaintiff,*	)	No.94-CV-74931-DT
vs.	)	Hon. Gerald E.Rosen
GARY L. TUNIS, RICHARD THOMPSON, JOHN MEIERS and RICHARD D. KUHN, *Defendants.*	)	

ORDER ENTERING FINAL JUDGMENT
FOR DEFENDANT KUHN ONLY

At a session of said Court, held in the U.S Courthouse, Detroit, Michigan on August 29, 1995.

PRESENT: Honorable Gerald E. Rosen
United States District Judge

By order dated July 13, 1995, this Court granted Defendant Kuhn's Motion for Summary Judgment. In announcing this decision on June 20, 1995, the Court stated that the claims against Defendant Kuhn would be dismissed "with prejudice.'' Pursuant to Federal Rule of Civil Procedure 54(b), the Court now finds that there is no just reason for delay in the entry of final judgment as to those claims against Defendant Kuhn, and that final judgment should accordingly be entered for Defendant Kuhn only.

NOW, THEREFORE, IT IS HEREBY ORDERED that Plaintiff's Request for Final Judgment for Defendant Kuhn pursuant to Rule 54(b) be GRANTED, and that final judgment be entered as to those claims against Defendant Kuhn only.

/s/ Gerald E. Rosen
U.S. District Court Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
AT THE SOUTHERN DIVISION

ORDER AND OPINION
FOR CIVIL CASE NO. 94-CV-74931-DT
ENTERED NOVEMBER 15, 1995

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BILLIE M. IRELAND, *Plaintiff,*	)	No.94-CV-74931-DT
vs.	)	Hon. Gerald E.Rosen
GARY L. TUNIS, RICHARD THOMPSON, JOHN MEIERS and RICHARD D. KUHN, *Defendants.*	)	

ORDER ENTERING FINAL JUDGMENT FOR DEFENDANTS TUNIS, THOMPSON, AND MEIERS

At a session of said Court, held in the U.S Courthouse, Detroit, Michigan on November 15, 1995.

PRESENT: Honorable Gerald E. Rosen
United States District Judge

The Court having this date entered an Opinion and Order granting the Motion for Summary Judgment filed by Defendants Tunis, Thompson, and Meiers,

NOW THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that a JUDGMENT be and hereby is entered for Defendants Tunis, Thompson, and Meiers.

Because this Court previously entered a final judgment for Defendant Kuhn by Order dated August 29, 1995, this case is hereby DISMISSED WITH PREJUDICE.

/s/ Gerald E. Rosen
U.S. District Court Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BILLIE M. IRELAND, *Plaintiff,*	)	No.94-CV-74931-DT
vs.	)	Hon. Gerald E.Rosen
GARY L. TUNIS, RICHARD THOMPSON, JOHN MEIERS and RICHARD D. KUHN, *Defendants.*	)	

OPINION AND ORDER REGARDING
PLAINTIFF'S AND DEFENDANTS' MOTIONS
FOR SUMMARY JUDGMENT

At a session of said Court, held in the U.S Courthouse, Detroit, Michigan on November 15, 1995.

PRESENT: Honorable Gerald E. Rosen
United States District Judge

I. INTRODUCTION

Plaintiff Billie M. Ireland ("Plaintiff"), Mayor of the City of Rochester Hills since 1985, brought this action against Defendants Gary L. Tunis, Richard Thompson, John Meiers, and Richard D. Kuhn on December 8, 1994. Defendants Tunis, Thompson and Meiers ("Defendants") are, respectively, an Assistant Prosecuting Attorney for Oakland County, the Oakland County Prosecutor (an elected official), and an investigator for the Prosecutor's Office. Defendant Richard D. Kuhn (also elected) is a Circuit Court Judge for Oakland County. Plaintiff brought her claims under 42 U.S.C. § 1983, alleging violations of her Fourth and Fourteenth Amendment rights by all Defendants. Specifically, Plaintiff asserts that she was arrested pursuant to an illegally obtained warrant.

In an opinion and order issued on July 13, 1995, this Court granted Defendant Kuhn's motion for summary judgment as to all claims against him. The remaining Defendants have now filed a motion for summary judgment on the remaining claims. Plaintiff has also filed a motion for summary judgment on those claims. In addition, Plaintiff has

filed a motion to compel discovery, seeking to depose Assistant Prosecuting Attorney Lawrence Kozma, the chief of the warrant division of the Prosecutor's Office at the time the arrest warrant was issued, and also requesting additional documents allegedly bearing on the decision to seek a warrant for Plaintiff's arrest.

Counsel for the parties addressed these motions at a hearing before this Court on October 19, 1995. After considering the arguments made by counsel at that hearing and reviewing all of the documents filed by the parties, the Court is now prepared to rule on these motions. For the reasons stated below, the Court hereby grants Defendants' motion for summary judgment. This determination necessarily dictates the denial of Plaintiff's motions for summary judgment and to compel discovery.

II . FACTUAL AND PROCEDURAL BACKGROUND

On October 5, 1993, Defendant Kuhn, who was at that time the Chief Judge of the Oakland County Circuit Court, issued a warrant for the arrest of Plaintiff, based on allegations made in a criminal complaint signed by Defendants Tunis and

Meiers, authorized by Defendants Thompson and Tunis, and apparently presented to Judge Kuhn by Defendants Tunis and Meiers. This supporting complaint accused Plaintiff, in essence, of participating in a scheme to misappropriate public funds. The following day, Plaintiff surrendered to authorities. On May 20, 1994, after conducting a preliminary hearing, a Michigan district court judge dismissed all charges against Plaintiff for lack of probable cause. Plaintiff subsequently commenced the instant action pursuant to 42 U.S.G. § 1983, alleging that Defendants' actions in securing an arrest warrant violated her constitutional rights under the Fourth and Fourteenth Amendments.

A. **The Alleged Basis for Criminal Charges Against Plaintiff**

The allegations that led to Plaintiff's arrest concern payments made by the City of Rochester Hills (the "City") to Gerald Carlin ("Carlin") of the Oakland County Sheriff's Department. Rather than creating its own police force, the City elected many years ago to enter into a contract with Oakland County, under which the County Sheriff's Department provides police services to the City. Carlin was assigned to the

Rochester Hills Substation of the Sheriff's Department, and has been responsible for overseeing all law enforcement activities within the City since the mid-1980s.

When the City sought to increase its police force and appoint a captain for its Substation, Plaintiff, the City's Mayor, entered into discussions with various Sheriff's Department representatives, including Oakland County Sheriff John Nichols. These discussions culminated in the formation of a new contract for law enforcement services, which was signed in January, 1991, by Plaintiff, Sheriff Nichols, and the Oakland County Executive.

This contract, like prior agreements, called for the City to pay the County for the provision of police services, and for the County in turn to compensate the individual officers who provided such services. Although the contract provided that the City "shall not he required to assume any liability for the direct payment of salaries, wages or other compensation to the County for any County personnel performing the services set forth in this document, (Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment,

Ex. 3, 13) (emphasis added), the contract apparently did not forbid direct payments by the City to individual officers.

In conjunction with the execution of this new contract, Carlin was appointed Captain of the Rochester Hills Substation in January, 1991. Sheriff's Department rules provided that, as a captain, Carlin was no longer eligible for overtime pay. However, the contract between the City and Oakland County provided that "Law Enforcement Services beyond the scope of this contract are available upon request by the local jurisdiction to be paid for at the established overtime rate." (Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment, Ex. 3, 14). Moreover, Plaintiff alleges that her administrative assistant, Doris Keylon, obtained the approval of a Sheriff's Department official for the City to make overtime payments directly to Carlin.

Accordingly, in January, 1991, the City began to directly compensate Carlin for his overtime hours. These payments, authorized by Plaintiff, totalled over $20,000.00 for the period between January, 1991, and December, 1992. The City originally planned to pay Carlin a fixed weekly amount, but eventually

arrived at an arrangement under which Carlin submitted overtime time sheets for Plaintiff's approval each pay period, and the City then compensated Carlin at one and one-half times his usual hourly rate for his overtime hours.

B. The Preparation and Filing of the Criminal Complaint

In December, 1992, after receiving an anonymous letter alleging various improprieties in the Rochester Hills Substation, the Sheriff's Department began an internal investigation of Carlin. This investigation revealed that Carlin was receiving regular payments from the City. The parties dispute whether the County Prosecutor's Office became involved in the investigation in late 1992, or only upon Plaintiff requesting such involvement in early 1993.

Following a lengthy investigation, the Prosecutor's Office decided in October, 1993, to seek a warrant for Plaintiff's arrest. The criminal complaint prepared by Defendant Tunis during the course of this investigation charged Plaintiff, Carlin, and Doris Keylon with wrongdoing under two general

theories.[1] First, the complaint alleged that the City's direct payments to Carlin violated a state statute that requires counties to pay the salaries of sheriffs and deputy sheriffs. See Mich. Comp. Laws Ann. §§ 45.401-08. Next, the complaint alleged that the City budget prepared by Plaintiff improperly concealed the payments to Carlin, and that those payments therefore were not authorized by the Rochester Hills City Council.

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[1]The complaint included eight counts; counts one through six applied to Plaintiff, Carlin, and Doris Keylon, while counts seven and eight named only Carlin. Count one alleged a conspiracy by public officials to embezzle over $50. Count two alleged a conspiracy to commit the common-law offense of "misconduct in public office" through payment of city funds to Carlin. Count three alleged a conspiracy to use public funds for a purpose contrary to law. Counts four through six charged each individual with the offenses underlying the conspiracy charges in counts one through three. Finally, count seven charged Carlin with receipt of stolen property in excess of $100, and count eight charged Carlin with receiving additional compensation for duties for which he was already being paid by the Sheriff's Department.

Counts two and five included fairly lengthy (and nearly identical) statements of facts, and count eight alleged that Carlin received additional compensation from the City of Rochester Hills. The remaining counts included essentially no supporting facts; rather, they stated the relevant provisions of the laws that allegedly were violated.

Although the parties still dispute some details regarding the preparation of the criminal complaint and its presentation to Judge Kuhn, the record adequately discloses the pertinent aspects of each Defendant's role in that process. Defendant Thompson received occasional informal reports regarding the status of the investigation, attended a meeting in the late summer of 1993 at which various possible charges against Plaintiff were discussed, ordered that some of the proposed charges against Plaintiff be deleted from the complaint, and ultimately authorized and concurred in the decision of the assistant prosecutors to seek an arrest warrant. Defendant Tunis, as one of the two assistant prosecutors assigned to oversee the investigation,[2] periodically met with investigators (including Defendant Meiers), reviewed interview transcripts and documents provided by the investigators, and drafted and frequently updated the criminal complaint as the investigation progressed. Defendant Meiers was one of the investigators who interviewed witnesses and obtained and

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[2]Kim Wilson, the other assistant prosecutor involved in the investigation, was not named as a defendant in the instant suit.

reviewed documents, and he also signed the complaint as prepared and presented to him by Defendant Tunis without suggesting any changes.

After signing the criminal complaint,[3] Defendants Tunis and Meiers presented it to Defendant Kuhn on October S. 1993.[4] Plaintiff alleges that Judge Kuhn held no hearing before issuing the arrest warrant, and that the complaint was not sworn to under oath as required by the Fourth Amendment. However, at his deposition, Judge Kuhn testified that the complaint was sworn to under oath, and that he did hold a hearing on the matter,

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[3]The complaint designates Defendant Meiers as the "complaining witness". and Defendant Tunis as the Assistant Prosecuting Attorney who "authorized" the application for a warrant.

[4]At his deposition, Defendant Kuhn recalled that Defendant Tunis presented the complaint and sought the arrest warrant, but Judge Kuhn was not certain whether Tunis was accompanied by others from the Prosecutor's Office. (Kuhn Dep. at 17-18). Defendant Tunis testified at his deposition that an unsigned copy of the complaint was delivered to Judge Kuhn the evening before the warrant was issued, and that he, Defendant Meiers, and perhaps Kim Wilson were present when Judge Kuhn issued the warrant on October S. (Tunis Dep. at 47-48, 55-56, 59) Defendant Meiers similarly testified at his deposition that he was given a copy of the complaint on October 4, and that he signed and swore to the contents of the complaint before Judge Kuhn on October 5. (Meiers Dep. at 127, 138).

albeit without a court reporter present.[5] (Kuhn Dep. at 18-21). In any event, Judge Kuhn issued the warrant for Plaintiff's arrest on October 5, 1993.

After hearing four days of testimony, Michigan District Court Judge Nelson ordered on May 20, 1994, that all charges against Plaintiff and Doris Keylon be dismissed for lack of probable cause. Judge Nelson also dismissed all but one of the charges against Carlin. Carlin was tried on the remaining misdemeanor charge of accepting payments from the City in violation of Mich. Comp. Laws § 45.408, and was acquitted by a jury on May 25, 1995. Finally, in response to a motion to quash the warrant for Plaintiff's arrest, Judge Nelson issued an opinion finding that the procedure used to obtain the warrant violated the Fourth Amendment.

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[5]The deposition testimony of Defendant Tunis supports Judge Kuhn's account. Tunis testified that on October S. 1993, he presented the warrant paperwork to Judge Kuhn, Defendant Meiers was sworn in, Defendant Meiers signed the complaint, and Judge Kuhn then signed the warrant. (Tunis Dep. at 59). According to Tunis, Judge Kuhn stated that he could make his probable cause determination based on the allegations contained in the complaint without need for sworn testimony, and that a Michigan statute authorized him to issue the arrest warrant without taking any sworn testimony. (Tunis Dep. at 56-57).

C. Procedural Background

Plaintiff filed the instant suit on December 8, 1994, alleging that Defendants' actions constituted an unreasonable seizure in violation of the Fourth Amendment. In particular, Plaintiff contends that the criminal complaint signed by Defendants Tunis and Meiers and authorized by Defendant Thompson failed to state a violation of any Michigan criminal law by Plaintiff. Moreover, Plaintiff asserts that the warrant for her arrest was not obtained in a proper judicial proceeding, because the complaint was not sworn to under oath and failed to establish probable cause that a criminal offense had been committed, and because Defendant Kuhn was not authorized under Michigan law to issue arrest warrants. Finally, Plaintiff alleges that her arrest was attributable to the "impure and malicious" motives of Defendants Tunis, Meiers, and Thompson.

By opinion and order dated July 13, 1995, this Court granted Defendant Kuhn's motion for summary judgment, holding that Defendant Kuhn was entitled to absolute immunity for the acts he performed in his judicial capacity. The Court found that, regardless of whether Michigan law authorizes state Circuit Court judges to

issue arrest warrants, Defendant Kuhn did not act in the clear absence of all jurisdiction when he issued the warrant for Plaintiff's arrest.

The Court is now presented with cross-motions for summary judgment. On August 31, 1995, the remaining Defendants filed a motion for summary judgment, based on the contention that they, like Judge Kuhn, are immune from suit under 42 U.S.C. § 1983 for the acts attributed to them. Also on August 31, 1995, Plaintiff filed a motion for summary judgment, based on the assertion that all of the elements underlying her claim have been conclusively established in state court or are otherwise no longer in dispute.

III. ARGUMENTS OF THE PARTIES

In support of their motion for summary judgment, Defendants argue that they are entitled to absolute immunity from suit for the acts alleged by Plaintiff, because all of the alleged acts were undertaken as part of initiating and pursuing a criminal prosecution. Alternatively, Defendants contend that they should prevail as a matter of law even if they are entitled only to qualified immunity for their

acts, because those acts did not violate any "clearly established rights" of the Plaintiff. Finally, apart from any question of immunity, Defendants assert that the undisputed facts show that Plaintiff does not have a viable claim under 42 U.S.C. § 1983.

In response to Defendants' motion, Plaintiff contends that absolute prosecutorial immunity does not attach where a warrant is procured without probable cause and in a court lacking jurisdiction to issue arrest warrants. Plaintiff also points out that Defendants' answer to her complaint asserted the defense of absolute immunity only as to Defendant Thompson, and not as to Defendants Tunis and Meiers. Next, Plaintiff asserts that qualified immunity does not shield Defendants from suit because their acts were objectively unreasonable.

Plaintiff's final response to Defendants' motion for summary judgment also constitutes the basis for her own motion for summary judgment. Specifically, Plaintiff contends that the Michigan district court's findings that the state lacked probable cause to proceed against her and that the arrest warrant was issued in violation of the

Fourth Amendment conclusively establish her prima facie case under 42 U.S.C. § 1983. Because the district court already addressed the issues surrounding the issuance of the warrant, Plaintiff asserts that Defendants are estopped from relitigating those issues. Accordingly, Plaintiff reasons that these conclusively established elements of her complaint, when combined with the undisputed facts, entitle Plaintiff to summary judgment on her substantive claims, leaving only the issue of damages for trial.

In response, Defendants cite several reasons why collateral estoppel should not apply to the issues addressed by the Michigan district court. In particular, Defendants point to the substantially different procedural posture of the Michigan court proceedings, and contend that Defendants lacked the opportunity or incentive to fully litigate the matters surrounding procurement of the arrest warrant in the Michigan court. Moreover, even if those matters were conclusively established by the Michigan court, Defendants contend that Plaintiff has failed to establish the intent necessary to prevail in a § 1983 claim.

IV. ANALYSIS

A. The Standards Governing Consideration of a Motion for Summary Judgment

The applicable Federal Rule of Civil Procedure dictates that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c) .

Three 1986 Supreme Court decisions -- Matsushita Elec. Indus. Co. v. Zenith Radio Corn., 475 U.S. 574, 106 S. Ct. 1348 (1986), Anderson v. Liberty Lobby, Inc., 477 U. S . 242, 106 S. Ct. 2505 (1986), and Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986) -- ushered in a "new era'' in the review of motions for summary judgment. These cases, in the aggregate, lowered the movant's burden on a summary judgment motion.[6] According to the Celotex Court:

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[6]"Taken together the three cases signal to the lower courts that summary judgment can be relied upon more so than in the past to weed out frivolous lawsuits and avoid wasteful trials." 10A Charles A. Wright et al., Federal Practice &

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, **and on which** that party will bear the burden of proof.

Celotex, 106 S. Ct. at 2552.

After reviewing the above trilogy of cases, the Sixth Circuit announced a set of principles to be applied to motions for summary judgment:

[*] Cases involving state of mind issues are not necessarily inappropriate for summary judgment.

[*] The movant must meet the initial burden of showing "the absence of a genuine issue of material fact" as to an essential element of the non-movant's case.

Procedure, § 2727, at 35 (supp. 1994).

[*] This burden may be met by pointing out to the court that the respondent, having had sufficient opportunity for discovery, has no evidence to support an essential element of his or her case.

[*] The respondent cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must "present affirmative evidence in order to defeat a properly supported motion for summary judgment."

[*] The trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact.

[*] The trial court has more discretion than in the "old era" in evaluating the respondent's evidence. The respondent must "do more than simply show that there is some metaphysical doubt as to the material facts." Further, "[w]here the record taken as a whole could not lead a rational

> trier of fact to find" for the respondent, the motion should be granted. The trial court has at least some discretion to determine whether the respondent's claim is "implausible."

See Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479-80 (6th Cir. 1989) (footnotes with citations omitted). The Court will apply these principles in its evaluation of the parties' motions for summary judgment.

B. Defendants Thompson and Tunis are Absolutely Immune from Plaintiff's § 1983 Claims.

In their motion for summary judgment, Defendants assert that they are entitled to absolute immunity from Plaintiff's § 1983 claims, because all of the acts alleged by Plaintiff were performed as part of Defendants' initiation and pursuit of a criminal prosecution. If Defendants can establish that they are entitled to absolute immunity, then this Court need proceed no further, because absolute immunity would entirely bar Plaintiff's suit.

Plaintiff first notes that Defendants' answer to her complaint asserted absolute immunity only as to the claims against Defendant Thompson, and argues that the remaining Defendants have waived this defense. As shown by the very case Plaintiff cites in support of this supposed waiver, this contention is without merit. In English v. Dyke, 23 F.3d 1086, 1089-91 (6th Cir. 1994), the Sixth Circuit reversed a district court's ruling that the defendants had waived the defense of qualified immunity by failing to raise it in their pre-answer motion to dismiss. The court found that such a failure to assert the defense of qualified immunity "would generally only waive the defense for the stage at which the defense should have been asserted." 23 F.3d at 1090. To illustrate this rule, the court noted that "a defendant who fails to timely assert the defense prior to discovery may waive the right to avoid discovery but may nonetheless raise the issue after discovery on summary judgment or at trial." 23 F.3d at 1090 (emphasis added).

The holding in English applies as well to the defense of absolute immunity, as shown by the case upon which English relies, Kennedy v. City of Cleveland, 797 F.2d 297 (6th Cir. 1986). In Kennedy, the

court found that the same principles of waiver and appealability govern both qualified and absolute immunity. 797 F.2d at 300-01. Although the court stated that "the failure to plead immunity may, at different stages of the litigation, work either a partial or complete waiver," the court's subsequent discussion reveals that a defense of immunity generally should be deemed completely waived only when the trial court finds waiver necessary "to maintain control of [its] docket and to assure the expeditious advancement of cases." 797 F.2d at 300. Accordingly, because there is no indication here that Defendants Tunis and Meiers sought to prejudice Plaintiff or delay this litigation by first asserting the defense of absolute immunity in their motion for summary judgment, and because Plaintiff was put on notice of this defense through Defendant Thompson's assertion of it in Defendants' combined answer to the complaint, the Court finds that all three Defendants may properly seek to invoke the defense of absolute immunity.

Accordingly, this Court now turns to its substantive inquiry into the defense of absolute immunity. This inquiry begins with Imbler v. Pachtman, 424 U.S. 409, 431, 96 S.Ct. 984, 995 (1976), in which

the Supreme Court explicitly held that state prosecutors are entitled to absolute immunity from civil suits under § 1983 for actions taken "in initiating a prosecution and in presenting the State's case." In Imbler, a convicted criminal defendant who was eventually set free pursuant to a writ of habeas corpus filed a § 1983 suit against a Los Angeles deputy district attorney, claiming that the prosecutor had knowingly used false testimony and suppressed material evidence at his trial. 424 U.S. at 412-16, 96 S.Ct. at 986-88. The Court surveyed the development of prosecutorial immunity at common law, and reasoned that the considerations that led to common-law immunity "dictate the same absolute immunity under § 1983 that the prosecutor enjoys at common law." 424 U.S. at 421-27, 96 S.Ct. at 990-93.

In particular, the Court cited two compelling reasons for conferring absolute immunity upon prosecutors. First, after noting that prosecutors enjoy common-law immunity from malicious prosecution suits, the Court reasoned:

> If a prosecutor had only a qualified immunity, the threat of § 1983 suits would undermine performance of his duties no less than would the threat

> of common-law suits for malicious prosecution. A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages.

424 U.S. at 424, 96 S.Ct. at 992. Among other concerns, the Court specifically sought to avoid any undue influence that public curiosity might exert upon a prosecutor's decisionmaking:

> A prosecutor often must decide, especially in cases of wide public interest, whether to proceed to trial where there is a sharp conflict in the evidence. The appropriate course of action in such a case may well be to permit a jury to resolve the conflict. Yet, a prosecutor understandably would be reluctant to go forward with a close case where an acquittal likely would trigger a suit against him for damages. 424 U.S. at 426 n.24, 96 S.Ct. at 993 n.24.

Next, the Court found that absolute prosecutorial immunity was necessary to ensure the effectiveness of judicial proceedings:

> The affording of only a qualified immunity to the prosecutor also could have an adverse effect upon the functioning of the criminal justice system. Attaining the system's goal of accurately determining guilt or innocence requires that both the prosecutor and the defense have wide discretion in the conduct of the trial and the presentation of evidence.

424 U.S. at 426, 96 S.Ct. at 993 (footnote omitted). Accordingly, although the Court recognized that "this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty, "the Court concluded that the district attorney's activities in the instant case aware intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force." 424 U. S. at 427-31, 96 S. Ct. at 993-95.

Having established the availability of prosecutorial immunity as a defense to § 1983 suits, the Supreme Court considered the precise boundaries of this immunity in three subsequent cases. First, although the case of Malley v. Brines, 475 U.S. 335, 106 S.Ct. 1092 (1-986), involved a § 1983 suit against a police officer rather than a prosecutor, the Court found it necessary to discuss prosecutorial immunity in order to explain why that defense was not available to the police officer. The plaintiffs claimed that the officer had violated their Fourth Amendment rights by applying for arrest warrants based on complaints and affidavits that allegedly failed to establish probable cause. 475 U.S. at 337-39, 106 S.Ct. at 1094-95.

The Malley Court rejected the officer's argument that his decision to seek a warrant was analogous to a prosecutors decision to seek an indictment, and thus was protected by absolute immunity under the reasoning of Imbler:

> We have interpreted § 1983 to give absolute immunity to functions "intimately associated with the judicial phase of the criminal process" not from an exaggerated

esteem for those who perform those functions, and certainly not from a desire to shield abuses of office, but because any lesser degree of immunity could impair the judicial process itself. We intend no disrespect to the officer applying for a warrant by observing that his action, while a vital part of the administration of criminal justice, is further removed from the judicial phase of criminal proceedings than the act of a prosecutor in seeking an indictment. Furthermore, the officer's] analogy, while it has some force, does not take account of the fact that the prosecutors act in seeking an indictment is but the first step in the process of seeking a conviction. Exposing the prosecutor to liability for the initial phase of his prosecutorial work could interfere with his exercise of independent judgment at every phase of his work, since the prosecutor might come to see later decisions in terms of their effect on his potential liability. Thus, we shield the prosecutor seeking an indictment because any lesser immunity could impair the performance of a central actor in the judicial process.

475 U. S. at 342-43, 106 S. Ct. at 1097. The Court thus concluded that the officer was entitled only to qualified immunity for his procurement of an arrest warrant. 475 U.S. at 344, 106 S.Ct. at 1098.

Next, in Burns v. Reed, 111 S.Ct. 1934 (1991), the Court considered whether the defense of absolute immunity was available for two specific activities performed by a prosecutor. In that case, Plaintiff Cathy Burns, who was charged with attempted murder but against whom all charges were eventually dropped, brought a § 1983 suit claiming that a prosecutor had knowingly relied upon a police officer's false testimony at a search warrant hearing, and that the prosecutor had provided false legal advice to the police by telling them that they "probably had probable cause" to arrest Burns. 111 S.Ct. at 1937, 1940. The Court first cited Imbler's recognition that prosecutors assume two distinct roles, serving both as advocates for the state and as administrators of criminal investigations. 111 S.Ct. at 1941 -42. Because the prosecutor acted in his advocacy role in appearing at the search warrant hearing, and because "the issuance of a search warrant is unquestionably a judicial act," the Court held the prosecutor absolutely immune

from a § 1983 claim based on his actions at the search warrant hearing. 111 S.Ct. at 1942.

Regarding the prosecutor's act of providing legal advice to the police, however, the Court found that this act lies within a prosecutor's investigative role. 111 S.Ct. at 1943. The Court, after noting the absence of an analogous common-law immunity, declined to extend absolute immunity to this investigatory function. 111 S.Ct. at 1943-45. Rather, the Court found that providing legal advice as part of a criminal investigation is not sufficiently closely related to the judicial process to warrant its protection through absolute immunity. 111 S.Ct. at 1943. In addition, the Court noted the scarcity of remedial devices available to deter a prosecutor's abuses while performing investigative tasks:

> [W]e note that one of the most important checks, the judicial process, will not necessarily restrain out-of-court activities by a prosecutor that occur prior to the initiation of a prosecution, such as providing legal advice to the police. This is particularly true if a suspect is not eventually

> prosecuted. In those circumstances, the prosecutor's action is not subjected to the "crucible of the judicial process."

111 S.Ct. at 1944 (citations omitted).

In a separate opinion, Justice Scalia reached an issue that is particularly relevant to the instant matter: namely, whether the prosecutor was entitled to absolute immunity for his decision to initiate the search warrant proceeding. Upon finding that the common law did not confer such immunity, Justice Scalia asserted that absolute immunity should similarly be unavailable in a § 1983 suit, notwithstanding language in Imbler that might suggest otherwise. 111 S.Ct. at 1946-49 (Scalia, J., concurring in part and dissenting in part). Justice Scalia reasoned that the prosecutor's role in seeking a search warrant was more analogous to the police officer's act of procuring an arrest warrant in Malley than to the prosecutor's acts under consideration in Imbler. 111 S.Ct. at 1949. Accordingly, Justice Scalia contended that Malley rather than Imbler should determine the extent of immunity for the act of seeking a search warrant, and he concluded that a prosecutor should enjoy only qualified immunity for that

act. 111 S.Ct. at 1949.

The Supreme Court most recently considered the scope of prosecutorial immunity in Buckley v. Fitzsimmons, 113 S.Ct. 2606 (1993). That case concerned a § 1983 claim that state prosecutors fabricated evidence in order to obtain an indictment and made false statements to the press that impaired the fairness of the § 1983 plaintiff's criminal trial. 113 S.Ct. at 2610. The Court found that the prosecutors were not entitled to absolute immunity for the alleged fabrication of evidence since this alleged act, which was undertaken well before a grand jury was impaneled, fell within the prosecutors' investigatory role. 113 S.Ct. at 2616-17. Neither could the prosecutors claim absolute immunity for their statements to the press, because "[c]omments to the media have no functional tie to the judicial process just because they are made by a prosecutor."' 113 S.Ct. at 2618.

Two guiding principles emerge from these Supreme Court cases. First, in order to ensure that absolute immunity serves its principal purpose of safeguarding the judicial process, the Court has limited absolute immunity to acts falling within the prosecutor's role

as advocate for the state, as opposed to the prosecutor's investigative role. Next, the Supreme Court has adopted a "functional" approach, finding that absolute immunity is conferred for the performance of prosecutorial functions, and not "merely because [those functions] are performed by a prosecutor." Buckley, 113 S.Ct. at 2615. Thus, the function performed by the § 1983 defendant, rather than that defendant's designation as a prosecutor, determines whether absolute immunity applies. Cf. Salyer v. Patrick, 874 F.2d 374 (6th Cir. 1989) (finding that state social workers were entitled to absolute immunity for filing a child abuse petition in juvenile court).

This Court's inquiry into the scope of prosecutorial immunity is informed not only by these general principles derived from Supreme Court cases, but also by a Sixth Circuit case squarely holding that a prosecutor's decision to file a criminal complaint and seek an arrest warrant was protected by absolute immunity. Joseph v. Patterson, 795 F.2d 549, 555-56 (6th Cir. 1986). The § 1983 plaintiff in Joseph asserted that arrest warrants were "knowingly obtained . . . based on false, coerced statements elicited . . . by the prosecutors and police." 795 F.2d 555. The court stated:

[W]e find that such conduct, however reprehensible, would be protected by absolute immunity. The decision to file a criminal complaint and seek issuance of an arrest warrant are quasi-judicial duties involved in "initiating a prosecution," which is protected by Imbler. To be sure, there are some cases which hold that such conduct is not subject to absolute immunity either because it is viewed as investigatory activity or because the prosecutor sought the warrant and filed the complaint out of a wholly personal motivation unrelated to his official duties. However, we believe that securing the person of the defendant is part of initiating a prosecution and should be insulated. "Without the presence of the accused, the initiation of a prosecution would be futile." Moreover, extending absolute immunity to this function is consistent with the public policy and common law considerations outlined in Imbler . . . . In addition, the judicial process is available to help safeguard the ultimate interests of the accused. Indeed, in this case the charges were dismissed upon preliminary examination by the [Michigan]

circuit court.

795 F.2d at 555-56 (citations omitted).

Turning to the instant matter, Imbler appears to support Defendants' contention that they are entitled to absolute immunity, and the Sixth Circuit's ruling in Joseph further strengthens that contention. Just as in Joseph, Plaintiff bases her § 1983 suit upon a claim that the Defendants knowingly sought an arrest warrant without probable cause. Accordingly, Defendants Thompson and Tunis assert that they are absolutely immune from suit under § 1983 for their decision to file a criminal complaint and seek an arrest warrant. Next, although Defendant Meiers is an investigator rather than a prosecutor, he contends that the Supreme Court's functional approach leads to the conclusion that he also is entitled to absolute immunity, because Plaintiff's only claims against him arise from his involvement in filing the complaint and seeking the arrest warrant.

However, Plaintiff submits that two obstacles stand in the way of this Court's straightforward application of Joseph to the instant matter. First, given the Supreme Court's holding in

Malley, and particularly in light of Justice Scalia's analysis in his separate opinion in Burns, Plaintiff challenges the continuing vitality of the Sixth Circuit's decision in Joseph.[7] Yet, courts have continued to cite Joseph and reach the same result notwithstanding Burns and Malley. For example, in Rulwicki v. Dawson, 969 F.2d 1454, 1463-64 (3d Cir. 1992), the Third Circuit found that a county district attorney was absolutely immune from suit despite the claim that he had initiated criminal charges out of "purely political motives." Although the court noted that the circumstances surrounding the filing of criminal charges were "not above suspicion," the court concluded that "[c]onsideration of personal motives is directly at odds with the Supreme Court's simple functional analysis of prosecutorial immunity." 969 F.2d at 1464; see also Schrob v. Catterson, 948 F.2d 1402, 1412-17 (3d Cir. 1991)

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[7]The decision in Malley actually was handed down prior to the decision in Joseph, as shown by Joseph's citation to Malley in support of the proposition that immunity should be conferred by function rather than status. See Joseph, 795 F.2d at 554. However, the Joseph court did not discuss the possible relevance of Malley to its decision that the defendant prosecutors enjoyed absolute immunity for their procurement of arrest warrants.

(finding, despite Burns, that a prosecutor seeking a seizure warrant is performing an advocacy function, and thus is entitled to absolute immunity). But see Kohl v. Casson, 5 F.3d 1141, 1145-46 (8th Cir. 1993) (finding that Burns dictates that a prosecutor enjoys absolute immunity for appearing before a magistrate to seek an arrest warrant, but not for advising a police officer on preparing an affidavit in support of the warrant or for presenting the affidavit as true to the magistrate).

Moreover, Justice Scalia's separate opinion in Burns considered alleged constitutional violation in a prosecutors procurement of a search warrant rather than an arrest warrant. Justice Scalia explained the importance of this distinction to his view that Malley rather than Imbler controlled the availability of absolute immunity:

> It could be argued . . . that a prosecutor's role in seeking a search warrant is akin to a prosecutors role in seeking an indictment, and thus that Imbler's holding alone governs the present suit. But insofar as the relevant factors are concerned, this case is further from Imbler than was Malley,

> which denied absolute immunity to a policeman for procuring an arrest warrant. Imbler recognized absolute immunity out of a desire to protect actions "intimately associated with the judicial process." Malley rejected a further extension because the act of procuring an arrest warrant "is further removed from the judicial phase of criminal proceedings than the act of a prosecutor in seeking an indictment." The act of procuring a mere search warrant is further removed still.

Burns, 111 S.Ct. at 1949 (Scalia, J., concurring in part and dissenting in part) (emphasis in original) (citations omitted); see also Joseph, 795 F.2d at 556 (finding that the prosecutors' entitlement to absolute immunity for procuring a search warrant required a "factual inquiry"' that was unnecessary to the court's immunity analysis regarding the prosecutors' procurement of an arrest warrant). In contrast, Plaintiff's § 1983 suit, like the claim in Joseph, complains of improprieties in Defendants' filing of a criminal complaint and procurement of an arrest warrant. Thus, Defendants' actions here are more closely associated with the

judicial process than the prosecutors actions analyzed by Justice Scalia in Burns.

Next, Plaintiff attempts to distinguish her claim from the claim considered in Joseph by alleging that the arrest warrant, apart from being obtained without probable cause,[8] was issued by a court without jurisdiction. Because the Supreme Court has clearly stated that absolute prosecutorial immunity from § 1983 suits is principally intended to protect the judicial process, Plaintiff infers that Defendants are not entitled to absolute immunity for obtaining an arrest warrant from Judge Kuhn "outside

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[8]Plaintiff also seems to believe that her claim is somehow distinguishable from Joseph solely by virtue of her allegation that the complaint filed by Defendants failed to state probable cause for her arrest, and thus violated the Fourth Amendment. This assertion, however, is fundamentally at odds with the concept of absolute immunity, which, when it applies, invalidates a § 1983 claim regardless of the motives or improper acts of the prosecutor. For example, in Joseph, the prosecutors were charged with knowingly using false statements to obtain arrest warrants. 795 F.2d at 555. Surely these allegations, if true, would cast doubt on the legitimacy of the warrants that subsequently were issued, and would undermine any claim that those warrants were supported by probable cause. Yet, the Joseph court nonetheless found that the prosecutors were entitled to absolute immunity, because they were engaged in the initiation of a prosecution. 795 F.2d at 555.

the judicial process." However, this Court's prior opinion granting Defendant Kuhn's motion for summary judgment indicated that Michigan law appears to authorize circuit courts to issue arrest warrants. Moreover, in that opinion, this Court flatly rejected Plaintiff's contention that the case of People v. Farmilo, 337 Mich. App. 378, 358 N.W.2d 350 (1984), conclusively demonstrates that Michigan circuit court judges lack the discretionary power to entertain requests for arrest warrants. Finally, in support of his motion for summary judgment, Defendant Kuhn pointed out that the longstanding practice of Chief Judges of the Oakland County Circuit Court to issue arrest warrants has never been found to violate Michigan law. Accordingly, the Court finds that Defendants did not act "outside the judicial process" when they sought an arrest warrant from Judge Kuhn.

Having rejected Plaintiff's arguments to the contrary, the Court concludes that Joseph controls the instant matter. It remains to apply the principles established in that case to the facts of this one. Joseph unquestionably dictates that Defendant Thompson is absolutely immune from Plaintiff's claims. In Joseph, the

prosecutors allegedly acted in conjunction with the police to coerce false statements that were subsequently used to obtain arrest warrants, yet the court still found that the decision to seek the warrants was protected by absolute immunity. Joseph, 795 F.2d at 551, 555. Here, in contrast, Defendant Thompson's involvement in the investigation was limited to high-level and remote review of its progress. At most, Plaintiff alleges, without any evidentiary support, that Defendant Thompson acted from improper political motives when he allegedly determined that his office should investigate Plaintiff's involvement in the payments to Carlin[9] and agreed that the investigation had produced enough evidence to support procurement of an arrest warrant. Moreover, the charges against Defendant Thompson in Plaintiff's complaint all arise from his involvement in the decision to seek an arrest warrant.

Accordingly, because Plaintiff has offered no evidence of any wrongdoing by

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[9]The parties dispute the timing of the commencement of the Prosecutor's Office investigation. Defendants contend that the investigation began only after Plaintiff requested it, while Plaintiff asserts that it began somewhat earlier.

Defendant Thompson in the investigation preceding Plaintiff's arrest, and because the record reveals that he played only a high-level supervisory role in that investigation, the Court finds that any possible claims against Defendant Thompson are based entirely on his participation in the decision to seek an arrest warrant. Joseph dictates that this decision by a prosecutor is part of the initiation of a prosecution, and thus is protected by absolute immunity. Therefore, Plaintiff cannot sustain her § 1983 claims against Defendant Thompson.

Defendant Tunis' claim that he enjoys "absolute immunity presents a closer question. He clearly was involved in the investigation, and as it proceeded he periodically met with the investigators, including Defendant Meiers. Thus, his involvement in procuring an arrest warrant -- and, in particular, his acts of drafting and signing the criminal complaint -- could be viewed as either the conclusion of his investigatory role or the commencement of his advocacy role. Yet, the claims asserted against Defendant Tunis in Plaintiff's complaint concern only his participation in the allegedly tainted process of preparing a criminal complaint and seeking an arrest warrant. Moreover,

as with Defendant Thompson, Plaintiff raises only the most oblique allegations, unsupported by evidence, that Defendant Tunis' conduct during the investigation might somehow have been affected by political or face-saving motives. The Court finds, therefore, that Plaintiff's claims against Defendant Tunis are based on activities he performed in his role as advocate for the State as opposed to his investigatory role. Because Defendant Tunis is, in essence, being charged with improper initiation of a prosecution, the Court concludes that he is entitled to absolute immunity from Plaintiff's claims.

However, the Court disagrees with Defendant Meiers' assertion that he too is entitled to absolute immunity. While it is true that Plaintiff's complaint alleges only that Defendant Meiers participated in preparation of an improper criminal complaint and procurement of an invalid warrant, and not that his actions during the course of the investigation were improper, Defendant Meiers did not play the dual role that Defendant Tunis did. Instead, Defendant Meiers performed only investigative duties during the entire course . of events leading up to Plaintiff's arrest. Accordingly, the

Supreme Court's functional approach to determining the availability of absolute immunity dictates that Defendant Meiers does not enjoy such immunity.

Defendants' attempt to bring Defendant Meiers within the ambit of prosecutorial immunity is unavailing. Essentially, Defendants argue that Defendant Meiers played only a "rubber-stamp'' role in the procurement of the warrant, because he acted entirely under the direction of Defendant Tunis in signing the complaint and swearing to the truth of its contents before Judge Kuhn. However, Defendant Meiers can hardly claim to be equivalent to a "man off the street" in the process of applying for a warrant. Surely Defendant Tunis' selection of Defendant Meiers to sign the complaint and appear before Judge Kuhn was informed by Defendant Meiers' knowledge gained pursuant to his role as investigator. Defendant Meiers' involvement in the procurement of an arrest warrant, therefore, is much more akin to the police officer's actions in Halley than to the prosecutor's decisionmaking in Joseph. Accordingly, the Court finds that Defendant Meiers does not enjoy absolute immunity from Plaintiff's § 1983 suit.

In summary, the Court holds that Plaintiff cannot sustain her § 1983 claims against Defendants Thompson and Tunis, because their involvement in the process of obtaining an arrest warrant is protected by absolute immunity. However, Defendant Meiers is not entitled to absolute immunity, because he acted as an investigator in that process. Accordingly, the Court proceeds to consider whether qualified immunity suffices to defeat Plaintiff's claims against Defendant Meiers.

C. Defendant Meiers is Entitled to Qualified Immunity from Plaintiff's 1983 Claims.

In Malley v. Brines, 475 U.S. 335, 106 S.Ct. 1092 (1986), the Supreme Court, having first determined that the defendant police officer did not enjoy absolute immunity from a § 1983 suit based on his alleged procurement of an arrest warrant without probable cause, considered the scope of the officer's qualified immunity. The Court adopted the "objective reasonableness" standard previously applied in the context of suppression hearings. 475 U.S. at 344, 106 S.Ct. at 1097-98. This rule eschewed any subjective inquiry into the police officer's motives, and instead dictated

that the officer would be subject to a § 1983 suit only "if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." 475 U.S. at 341, 106 S.Ct. at 1096. In other words, "[o]nly where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable will the shield of immunity be lost." 475 U.S. at 344-45, 106 S.Ct. at 1098 (citations omitted).

The Supreme Court further developed this "objective reasonableness" standard in Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034 (1987). In that case, the Court held that an FBI agent who conducted a warrantless search of a home despite the alleged lack of probable cause or exigent circumstances could nonetheless prevail in a motion for summary judgment if, "in light of the clearly established principles governing warranties" searches, he could, as a matter of law, reasonably have believed that the search of the . . . home was lawful." 483 U.S. at 641, 107 S.Ct. at 3040. The Court reiterated that qualified immunity rests upon "objective legal

reasonableness," and stated that allegedly unlawful official action must be "assessed in light of the legal rules that were 'clearly established' at the time it was taken." 483 U.S. at 639, 107 S.Ct. at 3038 (citations omitted).

The Anderson Court then emphasized the importance of properly characterizing the "clearly established principle" at issue in a § 1983 suit. In particular, the Court noted that a plaintiff cannot prevail simply by claiming that the defendant violated some "clearly established" but abstract right, such as the general Fourth Amendment right to be free from unreasonable searches or seizures:

> [O]ur cases establish that the right the official is alleged to have violated must have been "clearly established'' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful,

> but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

483 U.S. at 640, 107 S.Ct. at 3039 (citations omitted).

The Sixth Circuit has also considered what it means for a right to be "clearly established." In Ohio Civil Serv. Employees Ass'n v. Seiter, 858 F.2d 1171 (6th Cir. 1988), the court stated:

> [I]n the ordinary instance, to find a clearly established constitutional right, a district court must find binding precedent by the Supreme Court, its court of appeals or itself. In an extraordinary case, it may be possible for the decisions of other courts to clearly establish a principle of law. For the decisions of other courts to provide such "clearly established law,' these decisions must both point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting.

858 F.2d at 1177; see also Thomas v. Whalen, 51 F.3d 1285, 1290 (6th Cir. 1995).

- The Seiter court also discussed the burdens of pleading and proof when a defendant raises a qualified immunity defense. Once such a defense has been asserted, the plaintiff must come forward with sufficient factual allegations to sustain a conclusion that the defendant violated clearly established law. 858 F.2d at 1174. Next, although qualified immunity is an affirmative defense, the defendant need not prove that no clearly established law was violated; rather, "the district court must decide the purely legal question of whether the law at the time of the alleged action was clearly established in favor of the plaintiff." 858 F.2d at 1174 (quoting Dominique v. Telb, 831 F.2d 673, 676 (6th Cir. 1987)).

This Court recently addressed the defense of qualified immunity in a case in which state troopers allegedly used excessive force during the arrest of an intoxicated driver by handcuffing him too tightly. Nemeckay v. Rule, 894 F. Supp. 310, 312 (E.D. Mich. 1995). In particular, this Court discussed the proper identification of the "clearly

established right" at issue in that case:

> Certainly, [the driver] had a clearly established right to be free from the excessive use of force in his arrest. However, as Anderson indicates, this does not end the inquiry. Rather, this Court must ask whether [the troopers] had reason to know that, under the circumstances of this particular arrest, failure to heed [the driver's] complaints [about the overly-tight handcuffs] could be considered an excessive use of force . . . . [I]f reasonable officers could disagree on whether Defendants' failure to loosen the handcuffs was excessive force, [the troopers] are entitled to qualified immunity.

894 F. Supp. at 316-17. Similarly, in the instant case, this Court must first ascertain the nature of the "clearly established right" that Defendant Meiers allegedly violated.

Plaintiff first argues that the right at issue in this case is her right to be free from arrest without probable cause. This argument merits only cursory treatment. As the Supreme Court pointed out in Anderson, and as this Court

reiterated in Nemeckay, the "objective reasonableness" test is rendered meaningless when the right allegedly violated is stated at this level of generality.

Instead, the proper inquiry in this case focuses on whether any reasonably competent investigator in Defendant Meiers' position would have concluded, in light of the preceding investigation and the criminal complaint presented to him by Defendant Tunis, that an arrest warrant should not be sought. As the Seventh Circuit has explained, this inquiry is "bifurcated" in nature: this Court "must ascertain the facts of which [Defendant Meiers] was aware, but it is beside the point whether he believed those facts added up to probable cause." Juriss v. McGowan, 957 F.2d 345, 349 (7th Cir. 1992). In ether words, the only "subjective" aspect of the "objective reasonableness" test in this case concerns the state of Defendant Meiers' factual knowledge at the time the arrest warrant was sought. The test then requires asking whether a reasonably competent investigator armed with this knowledge could have acted as Defendant Meiers did. If so, Defendant Meiers would be shielded by qualified immunity.

This Court finds that the participation of Defendant Meiers in the procurement of an arrest warrant was objectively reasonable; given what he knew from the investigation, it is far from "obvious that no reasonably competent officer would have concluded that a warrant should issue." Malley, 475 U.S. at 341, 106 S.Ct. at lose. The Fourth Amendment, of course, requires that no arrest warrant be issued without probable cause. In turn, probable cause is defined as those "facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." Criss v. City of Kent, 867 F.2d 259, 262 (6th Cir. 1988) (quoting Michigan v. DeFillinpo, 443 U.S. 31, 37, 99 S.Ct. 2627, 2632 (1979)). In the context of a qualified immunity determination, this Court need not find that probable cause actually existed to issue an arrest warrant, nor that Defendant Meiers so believed, but only that "officers of reasonable competence could disagree" on the existence of probable cause. Malley, 475 U.S. at 341, 106 S.Ct. at 1096.

At the time the warrant was sought, Defendant Meiers, as part of the investigative team, presumably knew that Carlin had received payments directly from the City of Rochester Hills, that Plaintiff herself signed the overtime slips pursuant to which Carlin was paid by the City, that the budget submitted by Plaintiff did not advise the City Council of those payments, and that it was at least open to dispute whether the Sheriff's Department had authorized the direct City payments to Carlin. Viewing these facts in light of Michigan law requiring that deputy sheriffs be paid by the counties for which they work, this Court concludes that a reasonably competent officer could have found that probable cause existed to criminally charge Plaintiff for her involvement in an allegedly illegal diversion of City funds to Carlin. Consequently, Defendant Meiers acted within the bounds of "objective reasonableness" when, based upon his knowledge of the facts uncovered during the investigation of the payments to Carlin, he sought a warrant for Plaintiff's arrest.

Notwithstanding this apparent reasonableness, Plaintiff argues that Defendant Meiers should forfeit the shield of qualified immunity because of

two alleged defects in the process of obtaining a warrant for Plaintiff's arrest. First, Plaintiff contends that the criminal complaint prepared by Defendants and used to obtain the warrant contained insufficient facts to establish probable cause. Plaintiff points out that only two of the eight counts in the complaint include supporting facts, and argues that even those facts fail to establish probable cause to believe that the charged offenses actually were committed. According to Plaintiff, the patent inadequacy of this complaint renders any reliance upon it by Defendant Meiers objectively unreasonable. Next, because Defendant Meiers did not prepare the criminal complaint, Plaintiff infers that he lacked personal knowledge of the allegations it contained. Given this lack of knowledge, Plaintiff asserts that Defendant Meiers acted unreasonably by signing the complaint and blindly swearing to the truth of its allegations.[10]

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[10]Plaintiff also contends that three other deficiencies in the process of securing the arrest warrant render Defendant Meiers' participation in that process objectively unreasonable. The first two of these additional allegations -- i.e., that the complaint was not sworn to under oath and that Judge Kuhn failed to hold a hearing before issuing the warrant -- are refuted by Defendants' deposition testimony, and

Regarding Plaintiff's first argument, Plaintiff directs the Court's attention to no case holding that a failure to recite facts supporting each individual count renders a criminal complaint legally deficient, nor has the Court's research located such a case. Instead, although the Supreme Court has held that "a warrant affidavit must set forth particular facts and circumstances underlying the existence of probable cause," Franks v. Delaware, 438 U.S. 154, 165, 98 S.Ct. 2674, 2681 (1978), and that "[s]ufficient information must be presented to the magistrate to allow that official to determine probable cause," Illinois v. Gates, 462 U.S. 213, 239, 103 S.Ct. 2317, 2333 (1983), the Court has emphasized the "flexible" and "common-sense" rather than "technical" nature of a probable cause inquiry.

Plaintiff has responded with no evidence that casts doubt on this testimony.

Plaintiff's final allegation of a procedural deficiency -i.e., that Defendants presented the complaint to a court lacking jurisdiction to issue warrants -- has already been rejected in the Court's analysis of absolute immunity. Moreover, for purposes of qualified immunity, even if Judge Kuhn lacked the power to issue warrants, Defendant Meiers would be entitled to rely on longstanding practice to the contrary to establish the reasonableness of seeking a warrant from Judge Kuhn. Plaintiff has pointed to no "clearly established law" that indicates otherwise.

Gates, 462 U.S. at 239-41, 103 S.Ct. at 2333. Accordingly, Defendant Meiers' reliance on the complaint at issue here appears to violate no "clearly established" legal principle.

Moreover, Plaintiff has not challenged Defendants' assertion that the complaint in question fully complied with the requirements of the applicable Michigan court rules and statutes. This compliance suggests that a reasonably competent investigator could have relied on the complaint notwithstanding its failure to state or restate supporting facts under each individual count.[11]

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[11]However, Defendants are incorrect in their assertion that this compliance conclusively proves that Defendant Meiers' reliance on the complaint was objectively reasonable. At the hearing on Defendants' and Plaintiff's cross-motions for summary judgment, counsel for Defendants strenuously argued that the criminal complaint's technical compliance with the applicable Michigan rules and statutes insulates the complaint from Plaintiff's attack. This argument is completely without merit, because content rather than form ultimately determines the reasonableness of Defendant Meiers' reliance on the complaint. Malley clearly shows that a police officer would forfeit the protection of qualified immunity if, for example, the officer's warrant application relied solely on known falsehoods and the officer possessed no other knowledge that might establish probable cause. This result would be utterly unaffected by the officer's showing that the warrant application conformed to technical rules.

Finally, the facts provided in the complaint, although not included under each individual count, appear in their totality to lay a sufficient foundation for the claim that Plaintiff paid city funds to Captain Carlin without proper authorization from the Rochester Hills City Council, in contravention of the terms of the City's contract for law enforcement services, and in violation of a Michigan statute dictating how deputy sheriffs are to be paid. The Court, therefore, finds that a reasonably competent investigator in Defendant Meiers' position could have concluded that the complaint adequately stated probable cause to arrest Plaintiff. Indeed, Judge Kuhn so found when presented with the complaint.[12]

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[12]Contrary to Defendants' assertion, this determination by Judge Kuhn is not dispositive, because the objective reasonableness of Defendants' actions is a legal question to be resolved by this Court. See Jeffers v. Heavrin, 10 F.3d 380, 381 (6th Cir. 1993) ("Reasonableness is a question of law to be decided by the trial judge.") Though Judge Kuhn's decision is entitled to some weight, the reasonableness question faced by this Court is analytically distinct from Judge Kuhn's determination that the complaint stated probable cause to issue an arrest warrant. Cf. Malley, 475 U.S. at 344 n.7, 106 S.Ct. at 1098 n.7 (rejecting an argument that the police officer was shielded from liability "because the judge's decision to issue the warrant [broke] the causal chain between the application for the warrant and the improvident arrest").

The Court also rejects Plaintiff's argument that Defendant Meiers unreasonably acted with a lack of personal knowledge when he signed the complaint.[13] Plaintiff once again fails to cite a case that suggests that this alleged lack of knowledge renders Defendant Meiers' actions legally suspect. Indeed, this Court finds that case law suggests exactly the opposite. For example, in Bennett v. City of Grand Prairie, 883 F.2d 400, 410 (5th Cir. 1989), the Fifth Circuit found that a police officer enjoyed qualified immunity for signing and presenting an affidavit to a magistrate despite his lack of personal knowledge of the facts contained in the affidavit. Although a fellow officer had prepared the affidavit and the signing officer had not participated in the investigation, the court held that lean officer who has no personal

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[13]This assumes that Plaintiff could establish Meiers' lack of personal knowledge, a highly problematic assumption. Plaintiff attempts to establish this lack of knowledge by citing deposition testimony in which Meiers concedes that he played no role in the drafting of the complaint. Yet, this in no way supports the inference that he lacked personal knowledge of the factual basis for the charges lodged in the complaint. Indeed, his role as an investigator involved from the inception of the Prosecutor's Office probe of the payments to Carlin suggests quite the contrary.

knowledge of facts asserted in an affidavit [may] rely on information provided by another officer to file a warrant application." 883 F.2d at 410. Similarly, in the instant case, Defendant Meiers properly could have relied on information provided by Defendant Tunis to the extent that he personally lacked knowledge of the facts included in the complaint. Moreover, Defendant Meiers' alleged lack of personal knowledge, even if true, would not bear on this Court's inquiry whether the criminal complaint is so lacking in probable cause that its use to obtain an arrest warrant would be objectively unreasonable.

Plaintiff attempts to rescue this argument by directing the Court's attention to the case of Davison v. Frey, 837 F. Supp. 235 (E.D. Mich. 1993). However, the Court finds that case readily distinguishable from the instant matter. In Davison, the court held that a prosecutor who signed an affidavit in support of a search warrant was not entitled to summary judgment based on a defense of qualified immunity. 837 F. Supp. at 239. Essential to that determination, though, was the plaintiffs, contention that the affidavit contained "false and reckless assertions. n 837 F. Supp. at 239. The court noted

that an official seeking a search warrant loses the shield of qualified immunity when he "omits material facts, knowingly and intentionally makes false statements, or makes false statements with a reckless disregard for the truth in an affidavit in support of the warrant." 837 F. Supp. at 239. Upon finding that a factual dispute remained concerning the truthfulness of the prosecutor's affidavit, the court concluded that summary judgment was inappropriate. 837 F. Supp. at 239.

Plaintiff contends that Davison is relevant to the instant case because Defendant Meiers acted with "reckless disregard for the truth" by signing a complaint that included facts of which he had no knowledge. However, Plaintiff has not alleged that the complaint included any false statements or omitted any material facts that might have affected Judge Kuhn's decision to issue a warrant. Rather, Plaintiff alleges, in essence, that Defendants' judgment was impaired by improper motives when they concluded that they possessed sufficient information to seek a warrant for Plaintiff's arrest. This concern about faulty judgment, however, is precisely one of the reasons why probable cause determinations are subject to independent review by a

magistrate. In contrast, where a supporting affidavit or complaint includes false statements, independent review is rendered ineffective. See Franks v. Delaware, 438 U.S. 154, 164-65, 98 S.Ct. 2674, 2681 (1978). The Court thus finds a rather large distinction between the allegedly false statements made by the prosecutor in Davison and Defendant Meiers' proper reliance on information from Defendant Tunis to the extent that he might have lacked personal knowledge of each and every fact included in the complaint. Because Plaintiff has produced absolutely no evidence to suggest that Defendant Meiers knew, or even had grounds to suspect, that any of the information contained in the complaint was false, the Court finds Davison inapposite to the instant matter.[14]

Finally, Plaintiff argues that the rulings of Michigan District Court Judge Nelson conclusively establish that Defendants' actions were objectively

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[14]In fact, another part of Davison actually supports this Court's conclusion that Defendant Meiers is entitled to qualified immunity, because that court, like this one, recognized that "a dispute as to the existence of probable cause is all that is needed in order to establish qualified immunity for an official who obtained a . . . warrant." 837 F. Supp. at 239.

unreasonable. Judge Nelson's dismissal of the charges against Plaintiff after a preliminary hearing establishes nothing of relevance to the instant inquiry. First of all, the determination after a hearing that the prosecutor had not established probable cause to go forward with the charges does not mean that probable cause was lacking to make the initial arrest. See Marx v. Gumbinner, 905 F.2d 1503, 1507 (11th Cir. 1990) ("That a defendant is subsequently acquitted or charges are dropped against the defendant is of no consequence in determining the validity of the arrest itself."). To find otherwise would ignore the very purpose for holding a preliminary hearing prior to going forward with a prosecution.[15] See Williams v. Kobel, 789 F.2d 463, 469 (7th Cir. 1986) (noting that, under Illinois law, "[a] finding of no probable cause at a preliminary hearing . . . may very well be made, and often is made, even though

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[15]It is worth noting that, after four days of testimony, Judge Nelson found that "certainly it was a most difficult case." (Plaintiff's Brief in Support of Motion for Summary Judgment, Ex. 3, at 8). Moreover, Judge Nelson appeared to primarily base his judgment on his evaluation of the credibility of witnesses who testified at the preliminary hearing. Such witness evaluations are, of course, unavailable to judges or magistrates in their determinations whether probable cause exists to issue arrest warrants.

there was probable cause to arrest the defendant").

Moreover, even if Judge Nelson's dismissal of the charges amounted to a finding that probable cause for an arrest was lacking, such a finding would not defeat Defendant Meiers' claim of qualified immunity. The Sixth Circuit has unequivocally stated that "probable cause determinations, even if wrong, are not actionable as long as such determinations pass the test of reasonableness." Jeffers v. Heavrin, 10 F.3d 380, 381 (6th Cir. 1993). Therefore, neither Judge Nelson's dismissal of the charges nor his ruling that the procedure followed to obtain the warrant violated the Fourth Amendment affects this Court's inquiry into the objective reasonableness of Defendants' actions.

In short, the Court finds that Defendant Meiers is entitled to qualified immunity for his participation in the procurement of the warrant for Plaintiff's arrest. His involvement in that process was objectively reasonable and violated no clearly established law. Accordingly, Plaintiff cannot sustain her § 1983 claims against Defendant Meiers.

V. **CONCLUSION**

Because Defendants Thompson and Tunis enjoy absolute immunity from Plaintiff's § 1983 suit, and because Defendant Meiers enjoys qualified immunity from that suit, the Court concludes that Defendants are entitled to summary judgment. This conclusion necessarily implies that Plaintiff's motions for summary judgment and to compel discovery must be denied.

For the foregoing reasons,

NOW, THEREFORE, IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment be GRANTED, and that Plaintiff's Motion for Summary Judgment and Motion to Compel Discovery be DENIED.

/s/ Gerald E. Rosen
U.S. District Court Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
CASE NOS. 95-2244/2333

ORDER DENYING PETITION
FOR REHEARING *EN BANC*,
FILED JUNE 26, 1997

Nos. 95-2244/2333

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BILLIE M. IRELAND,	)	
	)	
Plaintiff-Appellant,	)	
	)	
	)	
v.	)	ORDER
	)	
	)	
GARY L. TUNIS, ET AL.,	)	
	)	
Defendants-Appellees.	)	
	)	

BEFORE: MARTIN, Chief Judge; NORRIS and MOORE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/Leonard Green, Clerk

APPENDIX E

COMPLAINT FILED IN
THE PEOPLE OF THE STATE OF MICHIGAN
V.
GERARD LEO CARLIN;
BILLIE MARIE IRELAND;
DORIS KEYLON

COMPLAINT

THE PEOPLE OF THE STATE OF MICHIGAN

vs.

GERARD LEO CARLIN
63-93-046628-01 CTS 1 - 8

BILLIE MARIE IRELAND
63-93-046628-02 CTS 1 - 6

DORIS KEYLON
63-93-046628-03 CTS 1 - 6

Defendant(s)

DATE OF OFFENSE:
On or about 12/90-12/92

LOCATION:
Rochester Hills

COMPLAINANT:
People of the State of Michigan

COMPLAINING WITNESS:
Inv. John Meiers

A TRUE COPY
CLERK OF DISTRICT COURT #52
By _____ Deputy

STATE OF MICHIGAN)
)ss.
COUNTY OF OAKLAND)

The above-named COMPLAINING WITNESS being duly sworn before the undersigned Judge, Magistrate, or Clerk of the Circuit Court, upon the date indicated below, says that heretofore on the DATE OF OFFENSE listed above, at the LOCATION listed above in the said COUNTY OF OAKLAND, STATE OF MICHIGAN, the above-named Defendant(s),

COUNT 1 - CONSPIRACY - EMBEZZLEMENT BY PUBLIC OFFICIAL OVER $50

did unlawfully conspire, combine, confederate and agree together with one another and/or others to commit the crime of Embezzlement by Public Official Over $50, contrary to MCL 750.175; Contrary to the statute in such case made and provided and against the peace and dignity of the People of the State of Michigan.

Sec. 750.157(a), C.L. 1979; M.S.A. 28.354(1). [750.175] [C]. FELONY: 10 Years and $15,000.00

COUNT 2 - CONSPIRACY - MISCONDUCT IN PUBLIC OFFICE

did unlawfully conspire, combine, confederate and agree together with one another and/or others to commit an indictable offense at common law, to wit: Misconduct in Public Office, in that the said Billie Marie Ireland, being a public officer, to-wit: the Mayor of the City of Rochester Hills,

and, having the duty to exercise powers in the administration of the government of the City of Rochester Hills and in the management and control of municipal property, to do any act to advance the interests of the City, to enforce all laws, city ordinances and regulations, to ensure that all terms and conditions imposed in favor of the City or its inhabitants in any contract are faithfully kept and performed, to exercise such other powers and perform such other duties as may be prescribed by law or as may be required by ordinance or by direction of the City Council whether specifically enumerated or not in the Charter for the City of Rochester Hills, to prepare and administer the annual budget and keep the council fully advised at all times as to the financial condition and needs of the City;

and, the said Billie Marie Ireland having signed a contract on behalf of the City of Rochester Hills that provides for the County of Oakland to supply a Captain to provide police protection and supervision within the corporate limits of the City of Rochester Hills;

and, the said contract further providing that the City of Rochester Hills shall not be required to assume any liability for the direct payment of salaries, wages or other compensation to the County of Oakland for any county personnel performing the services set forth in the contract;

and, the Defendants further having knowledge that the said Captain was not entitled to and would not receive compensation for overtime in accordance with Oakland County rules and regulations;

the said persons did conspire, combine, confederate and agree that Billie Marie Ireland, under color of authority, would unlawfully, corruptly and wilfully direct or authorize the payment of city funds as extra compensation to Gerard Leo Carlin, the Captain of the Oakland County Sheriff's Department assigned to Rochester Hills, contrary to Article 11,

Section 3, of the Constitution of the state of Michigan and/or the Charter of the City of Rochester Hills and/or MCL 45.401 et seq and/or MCL 750.490 and/or MCL 51.242 and contrary to the aforementioned provisions of the contract, thereby to knowingly, wilfully and corruptly violate and betray the duties of her public office to uphold the Constitution of the State of Michigan, to enforce all laws, city ordinances and regulations and to ensure that the terms and conditions of the contract imposed in favor of the City were faithfully kept and performed, and thereby to wilfully and corruptly violate and betray the public trust reposed in her; Contrary to the statute in such case made and provided and against the peace and dignity of the People of the State of Michigan.

Sec. 750.505(a), C.L. 1979; M.S.A. 28.773. [750.505] [C]. FELONY: 5 Years and/or $10,000.00

COUNT 3 - CONSPIRACY - PUBLIC MONEY - SAFE KEEPING

did unlawfully conspire, combine, confederate and agree together with one another and/or others, under a pretext, to use, or allow to be used public moneys for a purpose other than allowed by law, to-wit: in violation of the Charter of the City of Rochester Hills, Article 11, Section 3, of the Constitution of the State of Michigan, MCL 45.401 and/or MCL 51.242; Contrary to the statute in such case made and provided and against the peace and dignity of the People of the State of Michigan.

Sec. 750.157(a), C.L. 1979; M.S.A. 28.354(1). [750.490] [C]. MISDEMEANOR: 2 Years and/or $11,000.00

COUNT 4 - EMBEZZLEMENT - PUBLIC OFFICIAL OVER $50

did, being a person holding public office in this state or the agent or servant of any person holding public office in this state, knowingly and unlawfully appropriate to his/her own use, or to the use of any other person, money or property received by him/her in his/her official capacity or employment, to-wit: such case made and provided and against the peace and dignity of the People of the State of Michigan.

Sec. 750.175, C.L. 1979; M.S.A. 28.372. [750.175]. FELONY: 10 Years or $5,000.00

COUNT 5 - MISCONDUCT IN PUBLIC OFFICE

did, commit an indictable offense at common law, to-wit: being a public officer, to-wit: the Mayor of the City of Rochester Hills, and;

having the duty to exercise powers in the administration of the government of the City of Rochester Hills and in the management and control of municipal property, to do any act to advance the interests of the City, to enforce all laws, city ordinances and regulations, to ensure that all terms and conditions imposed in favor of the City or its inhabitants in any contract are faithfully kept and performed, to exercise such other powers and perform such other duties as may be prescribed by law or as may be required by ordinance or by direction of the City Council whether specifically enumerated or not in the Charter for the City of Rochester Hills, to prepare and administer the annual budget and keep the Council fully advised at all times as to the financial condition and needs of the City;

and, having signed a contract on behalf of the City of Rochester Hills that provides for the County of Oakland to supply a Captain to provide police protection and supervision within the corporate limits of the City of Rochester Hills;

and, the said contract further providing that the City of Rochester shall not be required to assume any liability for the direct payment of salaries, wages or other compensation to the County of Oakland for any county personnel performing the services set forth in the contract;

and, the defendant further having knowledge that the said Captain was not entitled to and would not receive compensation for overtime in accordance with Oakland County rules and regulations;

did, under color of authority, unlawfully, corruptly and wilfully direct or authorize the payment of city funds as extra compensation to Gerard Carlin, the Captain of the Oakland County Sheriff's Department assigned to Rochester Hills, contrary to Article 11, Section 3, of the Constitution of the State of Michigan and/or the Charter of the City of

Rochester Hills and/or MCL 45.401 et seq and/or MCL 750.490 and/or MCL 51.242 and contrary to the aforementioned provisions of the Contract;

and thereby the defendant did knowingly, wilfully and corruptly violate and betray the duties of her public office to uphold the Constitution of the State of Michigan, to enforce all laws, city ordinances and regulations and to ensure that the terms and conditions of the contract imposed in favor of the City were faithfully kept and performed, and did wilfully and corruptly violate and betray the public trust reposed in her; Contrary to the statute in such case made and provided and against the peace and dignity of the People of the State of Michigan.

Sec. 750.505, C.L. 1979; M.S.A. 28.773. [750.505]. FELONY: 5 Years and/or $10,000.00

COUNT 6 - PUBLIC MONEY - SAFE KEEPING

did under a pretext, use, or allowed to be used public moneys for a purpose other than allowed by law, to-wit: in violation of the Charter of the City of Rochester Hills, Article 11, Section 3 of the Constitution of the State of

Michigan, MCL 45.401 and/or MCL 51.242; Contrary to the statute in such case made and provided and against the peace and dignity of the People of the State of Michigan.

Sec. 750.490, C.L. 1979; M.S.A. 28.758. [750.490]. MISDEMEANOR: 2 Years or $1,000.00

COUNT 7 - RECEIVING AND CONCEALING STOLEN PROPERTY IN EXCESS OF $100

did receive, possess, conceal, or aid in the concealment of certain stolen, embezzled or converted property, to-wit: money, knowing the same to be stolen, embezzled or converted, said property being of a value in excess of $100.00; Contrary to the statute in such case made and provided and against the peace and dignity of the People of the State of Michigan.

Sec. 750.535, C.L. 1979; M.S.A. 28.803. [750-535-A]. FELONY: 5 Years and/or $2,500.00

COUNT 8 - RETAINING FEES

did, being a deputy sheriff for the Oakland County Sheriff's Department, receiving a salary fixed and determined

by the Oakland County Board of Commissioners, such salary being compensation in full for all services performed by him as a deputy sheriff, receive additional compensation for such duties from the City of Rochester Hills, in violation of MCL 45.408; Contrary to the statute in such case made and provided and against the peace and dignity of the People of the State of Michigan.

Sec. 750.408, C.L. 1979. [45.408].
MISDEMEANOR: 6 Months and/or $500.00 fine

WARRANT AUTHORIZED BY

/s/Gary L. Tunis
Assistant Prosecuting Attorney

WHEREFORE, the said Complainant prays that the said Defendant(s) may be apprehended and held to answer this Complaint and further dealt with in relation to the same, as law and justice may require.

Dated 10/5/93 Subscribed and sworn to on this day by

/s/John Meiers
Complaining Witness

/s/Richard D. Kuhn
Before the above-named
Judge/Deputy Clerk/Magistrate

1. COMPLAINT

WARRANT

THE PEOPLE OF THE STATE OF MICHIGAN

vs.

GERARD LEO CARLIN
63-93-046628-01 CTS 1 - 8

BILLIE MARIE IRELAND
63-93-046628-02 CTS 1 - 6

DORIS KEYLON
63-93-046628-03 CTS 1 - 6

Defendant(s)

DATE OF OFFENSE:
On or about 12/90-12/92

LOCATION:
Rochester Hills

COMPLAINANT:
People of the State of Michigan

COMPLAINING WITNESS:
Inv. John Meiers

STATE OF MICHIGAN)
)ss.
COUNTY OF OAKLAND)

TO ANY SHERIFF, DEPUTY SHERIFF, COURT OFFICER, STATE POLICE OFFICER, OR POLICE OFFICER

WHEREAS, the above-named COMPLAINING WITNESS hath this day made and filed a Complaint in the District Court for the said Judicial District alleging that heretofore on the DATE OF OFFENSE listed above, at the LOCATION listed above in the said County, State of Michigan, the above-named Defendant(s)

COUNT 1 - CONSPIRACY - EMBEZZLEMENT BY PUBLIC OFFICIAL OVER $50

did unlawfully conspire, combine, confederate and agree together with one another and/or others to commit the crime of Embezzlement by Public Official Over $50, contrary to MCL 750.175; Contrary to the statute in such case made and provided and against the peace and dignity of the People of the State of Michigan.

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did unlawfully conspire, combine, confederate and agree together with one another and/or others to commit an indictable offense at common law, to wit: Misconduct in Public Office, in that the said Billie Marie Ireland, being a public officer, to-wit: the Mayor of the City of Rochester Hills,

and, having the duty to exercise powers in the administration of the government of the City of Rochester Hills and in the management and control of municipal property, to do any act to advance the interests of the City, to enforce all laws, city ordinances and regulations, to ensure that all terms and conditions imposed in favor of the City or its inhabitants in any contract are faithfully kept and performed, to exercise such other powers and perform such other duties as may be prescribed by law or as may be required by ordinance or by direction of the City Council whether specifically enumerated or not in the Charter for the City of Rochester Hills, to prepare and administer the annual budget and keep the council fully advised at all times as to the financial condition and needs of the City;

and, the said Billie Marie Ireland having signed a contract on behalf of the City of Rochester Hills that provides for the County of Oakland to supply a Captain to provide police protection and supervision within the corporate limits of the City of Rochester Hills;

and, the said contract further providing that the City of Rochester Hills shall not be required to assume any liability for the direct payment of salaries, wages or other compensation to the County of Oakland for any county personnel performing the services set forth in the contract;

and, the Defendants further having knowledge that the said Captain was not entitled to and would not receive compensation for overtime in accordance with Oakland County rules and regulations;

the said persons did conspire, combine, confederate and agree that Billie Marie Ireland, under color of authority, would unlawfully, corruptly and wilfully direct or authorize the payment of city funds as extra compensation to Gerard Leo Carlin, the Captain of the Oakland County Sheriff's Department assigned to Rochester Hills, contrary to Article 11,

Section 3, of the Constitution of the state of Michigan and/or the Charter of the City of Rochester Hills and/or MCL 45.401 et seq and/or MCL 750.490 and/or MCL 51.242 and contrary to the aforementioned provisions of the contract, thereby to knowingly, wilfully and corruptly violate and betray the duties of her public office to uphold the Constitution of the State of Michigan, to enforce all laws, city ordinances and regulations and to ensure that the terms and conditions of the contract imposed in favor of the City were faithfully kept and performed, and thereby to wilfully and corruptly violate and betray the public trust reposed in her; Contrary to the statute in such case made and provided and against the peace and dignity of the People of the State of Michigan.

Sec. 750.505(a), C.L. 1979; M.S.A. 28.773. [750.505] [C]. FELONY: 5 Years and/or $10,000.00

COUNT 3 - CONSPIRACY - PUBLIC MONEY - SAFE KEEPING

did unlawfully conspire, combine, confederate and agree together with one another and/or others, under a pretext, to use, or allow to be used public moneys

for a purpose other than allowed by law, to-wit: in violation of the Charter of the City of Rochester Hills, Article 11, Section 3, of the Constitution of the State of Michigan, MCL 45.401 and/or MCL 51.242; Contrary to the statute in such case made and provided and against the peace and dignity of the People of the State of Michigan.

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did, being a person holding public office in this state or the agent or servant of any person holding public office in this state, knowingly and unlawfully appropriate to his/her own use, or to the use of any other person, money or property received by him/her in his/her official capacity or employment, to-wit: such case made and provided and against the peace and dignity of the People of the State of Michigan.

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did, commit an indictable offense at common law, to-wit: being a public officer, to-wit: the Mayor of the City of Rochester Hills, and;

having the duty to exercise powers in the administration of the government of the City of Rochester Hills and in the management and control of municipal property, to do any act to advance the interests of the City, to enforce all laws, city ordinances and regulations, to ensure that all terms and conditions imposed in favor of the City or its inhabitants in any contract are faithfully kept and performed, to exercise such other powers and perform such other duties as may be prescribed by law or as may be required by ordinance or by direction of the City Council whether specifically enumerated or not in the Charter for the City of Rochester Hills, to prepare and administer the annual budget and keep the Council fully advised at all times as to the financial condition and needs of the City;

and, having signed a contract on behalf of the City of Rochester Hills that provides for the County of Oakland to supply a Captain to provide police

protection and supervision within the corporate limits of the City of Rochester Hills;

and, the said contract further providing that the City of Rochester shall not be required to assume any liability for the direct payment of salaries, wages or other compensation to the County of Oakland for any county personnel performing the services set forth in the contract;

and, the defendant further having knowledge that the said Captain was not entitled to and would not receive compensation for overtime in accordance with Oakland County rules and regulations;

did, under color of authority, unlawfully, corruptly and wilfully direct or authorize the payment of city funds as extra compensation to Gerard Carlin, the Captain of the Oakland County Sheriff's Department assigned to Rochester Hills, contrary to Article 11, Section 3, of the Constitution of the State of Michigan and/or the Charter of the City of Rochester Hills and/or MCL 45.401 et seq and/or MCL 750.490 and/or MCL 51.242 and contrary to the aforementioned provisions of the Contract;

and thereby the defendant did knowingly, wilfully and corruptly violate and betray the duties of her public office to uphold the Constitution of the State of Michigan, to enforce all laws, city ordinances and regulations and to ensure that the terms and conditions of the contract imposed in favor of the City were faithfully kept and performed, and did wilfully and corruptly violate and betray the public trust reposed in her; Contrary to the statute in such case made and provided and against the peace and dignity of the People of the State of Michigan.

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did under a pretext, use, or allowed to be used public moneys for a purpose other than allowed by law, to-wit: in violation of the Charter of the City of Rochester Hills, Article 11, Section 3 of the Constitution of the State of Michigan, MCL 45.401 and/or MCL 51.242; Contrary to the statute in such case made and provided and against the peace and dignity of the People of the State of Michigan.

Sec. 750.490, C.L. 1979; M.S.A. 28.758. [750.490]. MISDEMEANOR: 2 Years or $1,000.00

COUNT 7 - RECEIVING AND CONCEALING STOLEN PROPERTY IN EXCESS OF $100

did receive, possess, conceal, or aid in the concealment of certain stolen, embezzled or converted property, to-wit: money, knowing the same to be stolen, embezzled or converted, said property being of a value in excess of $100.00; Contrary to the statute in such case made and provided and against the peace and dignity of the People of the State of Michigan.

Sec. 750.535, C.L. 1979; M.S.A. 28.803. [750-535-A]. FELONY: 5 Years and/or $2,500.00

COUNT 8 - RETAINING FEES

did, being a deputy sheriff for the Oakland County Sheriff's Department, receiving a salary fixed and determined by the Oakland County Board of Commissioners, such salary being compensation in full for all services performed by him as a deputy sheriff, receive additional compensation for such duties from the City of Rochester Hills,

in violation of MCL 45.408; Contrary to the statute in such case made and provided and against the peace and dignity of the People of the State of Michigan.

Sec. 750.408, C.L. 1979. [45.408]. MISDEMEANOR: 6 Months and/or $500.00 fine

WHEREAS on examination of said sworn COMPLAINT by me, it appears to me that said offense has been committed and there is just cause to suspect that said Defendant(s) are guilty thereof: THEREFORE IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN, you and each of you are hereby commanded forthwith to take the said Defendant(s) and bring them before this Court, to be dealt with according to law.

Dated Oct 05 1993

/s/Richard D. Kuhn
Judge/Magistrate

2. WARRANT

APPENDIX F

MCL 600.151 1

MCL 600.601 2

MCL 600.605 3

MCL 764.1/1A 4

MCL 600.8511 9

MCL 691.1407 13

ANEXOS

MCL 600.151 1

MCL 600.601 2

MCL 600.605 3

MCL 764.1(1)(a) 4

MCL 600.8371 9

MCL 691.1407 13

MCL 600.151. Judicial power; courts

Sec. 151. The judicial power of the state is vested exclusively in 1 court of justice which shall be divided into 1 supreme court, 1 court of appeals, 1 trial court of general jurisdiction known as the circuit court, 1 probate court, and courts of limited jurisdiction created by the legislature.

MCL 600.601. Circuit courts; jurisdiction

Sec. 601. Circuit courts have the power and jurisdicrtion

(1) possessed by courts of record at the common law, as altered by the constitution and laws of this state and the rules of the supreme court, and

(2) possessed by courts and judges in chancery in England on March 1, 1847, as altered by the constitution and laws of this state and the rules of the supreme court, and

(3) prescribed by rule of the supreme court.

MCL 600.605. Circuit courts; original jurisdiction

Sec. 605. Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jursidiction by the constitution or statutes of this state.

MCL 764.1. Process; power to issue, allowance of warrant by prosecutor; electronic or electromagnetic communication

Sec 1. (1) For the apprehension of persons charged with a felony, misdemeanor, or ordinance violation, a magistrate may issue processes to implement this chapter, except that a magistrate shall not issue a warrant for other than a minor offense unless an authorization in writing allowing the issuance of the warrant is filed with the magistrate and, except as otherwise provided in this act, the authorization is signed by the prosecuting attorney, or unless security for costs is filed with the magistrate.

(2) A magistrate shall not issue a warrant for a minor offense unless an authorization in writing allowing the issuance of the warrant is filed with the magistrate and signed by the prosecuting attorney, or unless security for costs is filed with the magistrate, except if the warrant is requested by any of the following officials for the following offenses:

(a) Agents of the state transportation department, a county road commission, or the public service commission for violations of the motor carrier act, Act

No. 254 of the Public Acts of 1933, as amended, being sections 475.1 to 479.20 of the Michigan Compiled Laws, or the motor carrier safety act of 1963, Act No. 181 of the Public Acts of 1963, as amended, being sections 480.11 to 480.21 of the Michigan Compiled Laws, the enforcement of which has been delegated to them.

(b) The director of the department of natural resources, or a special assistant or conservation officer appointed by the director and declared by statute to be a peace officer, for a violation of a law which provides for the protection of wild game or fish.

(3) A complaint for an arrest warrant may be made by any electronic or electromagnetic means of communication if all of the following occur:

(a) The prosecuting attorney authorizes the issuance of the warrant. Authorization may consist of an electronically or electromagnetically transmitted facsimile of the signed authorization.

(b) The judge orally administers the oath or affirmation to an applicant for an arrest warrant who submits a complaint under this subsection.

(c) The applicant signs the complaint. Proof that the applicant has signed the complaint may consist of an

electronically or electromagnetically transmitted facsimile of the signed complaint.

(4) The person or department receiving an electronically or electromagnetically issued arrest warrant shall receive proof that the issuing judge has signed the warrant before the warrant is executed. Proof that the issuing judge has signed the warrant may consist of an electronically or electromagnetically transmitted facsimile of the signed warrant.

(5) The state court administrator shall establish paper quality and durability standards for warrants issued under this section.

MCL 764.1a. Warrants; issuance; complaints

Sec 1a. (1) A magistrate shall issue a warrant upon presentation of a proper complaint alleging the commission of an offense and a finding of reasonable cause to believe that the individual accused in the complaint committed that offense. The complaint shall be sworn to before a magistrate or clerk.

(2) The finding of reasonable cause by the magistrate may be based upon 1 or more of the following:

(a) Factual allegations of the complainant contained in the complaint.

(b) The complainant's sworn testimony.

(c) The complainant's affidavit.

(d) Any supplemental sworn testimony or affidavits of other individuals presented by the complainant or required by the magistrate.

(3) The magistrate may require sworn testimony of the complainant or other individuals. Supplemental affidavits may be sworn to before an individual authorized by law to administer oaths. The factual allegations contained in the complaint, testimony, or affidavits may be based upon personal knowledge, information and belief, or both.

(4) The magistrate shall not refuse to accept a complaint alleging a violation

of section 81 or 81a of the Michigan penal code, Act No. 328 of the Public Acts of 1931, being sections 750.81 and 750.81a of the Michigan Compiled Laws, or a violation of a local ordinance substantially corresponding to section 81 of Act No. 328 of the Public Acts of 1931 by the spouse of the victim, a former spouse of the victim, an individual with whom the victim has had a child in common, or an individual residing or having resided in the same household as the victim on grounds that the complaint is signed upon information and belief by an individual other than the victim.

(5) A warrant may be issued under this section only upon compliance with the requirements of section 1 of this chapter.

MCL 600.8511. District court magistrates; jurisdiction and duties

Sec. 8511. A district court magistrate shall have the following jurisdiction and duties:

(a) To arraign and sentence upon pleas of guilty or nolo contendere for violations of the following acts or parts of acts, or a local ordinance substantially corresponding to these acts or parts of acts, when authorized by the chief judge of the district court and if the maximum permissible punishment does not exceed 90 days in jail or a fine or both:

(*i*) Michigan vehicle code, Act No. 300 of the Public Acts of 1949, * * * being sections 257.1 to 257.923 of the Michigan Compiled Laws, except for violations of sections 625 and 625b of Act No. 300 of the Public Acts of 1949, being sections 257.625 and 257.625b of the Michigan Compiled Laws. However, the magistrate may have the jurisdiction to arraign defendants and set bond with regard to violations of sections 625 and 625b of Act No. 300 of the Public Acts of 1949.

(*ii*) Part 487 (sport fishing) of the natural resources and environmental protection act, Act No. 451 of the Public Acts of 1994, being sections 324.48701 to 324.48740 of the Michigan Compiled Laws.

(*iii*) Part 401 (Wildlife conservation) of Act No. 451 of the Public Acts of 1994, being sections 324.40101 to 324.40119 of the Michigan Compiled Laws.

(*iv*) Part 801 (marine safety) of Act No. 451 of the Public Acts of 1994, being sections 324.80101 to 324.80199 of the Michigan Compiled Laws.

(*v*) The motor carrier act, Act No. 254 of the Public Acts of 1933, * * * being sections 475.1 to 479.43 of the Michigan Compiled Laws.

(*vi*) Motor carrier safety act of 1963, Act No. 181 of the Public Acts of 1963, * * * being sections 480.11 to 480.21 of the Michigan Compiled Laws.

(*vii*) Part 821 (snowmobiles) of Act No. 451 of the Public Acts of 1994, being section 324.82101 to 324.82159 of the Michigan Compiled Laws.

(*viii*) Dog law of 1919, Act No. 339 of the Public Acts of 1919, * * * being sections 287.261 to 287.290 of the Michigan Compiled Laws.

(*ix*) Section 33a, 33b, or 34 * * * of the Michigan liquor control act, Act No. 8 of the Public Acts of the Extra Session of 1933, * * * being sections 436.33a, 436.33b, and 436.34 * * * of the Michigan Compiled Laws.

(*x*) Part 5 (department of natural resources general powers and duties) of Act No. 451 of the Public Acts of 1994,

being sections 324.501 to 324.511 of the Michigan Compiled Laws.

(*xi*) Part 811 (off-road recreation vehicles) of Act No. 451 of the Public Acts of 1994, being sections 324.81101 to 324.81150 of the Michigan Compiled Laws.

(*xii*) Part 89 (littering) of Act No. 451 of the Public Acts of 1994, being sections 324.8901 to 324.8907 of the Michigan Compiled Laws.

(*xiii*) Part 435 (hunting and fishing licensing) of Act No. 451 of the Public Acts of 1994, being sections 324.43501 to 324.43561 of the Michigan Compiled Laws.

(*xiv*) Part 731 (recreational trespass) of Act No. 451 of the Public Acts of 1994, being sections 324.73101 to 324.73111 of the Michigan Compiled Laws.

(*xv*) Chapter LXXXV of the Michigan penal code, Act No. 328 of the Public Acts of 1931, being sections 750.546 to 750.552a of the Michigan Compiled Laws.

(b) To issue warrants for the arrest of a person upon written authorization of the prosecuting or municipal attorney, except written authorization shall not be required for a vehicle law or ordinance violation within the jurisdiction of the magistrate if a police officer issued a traffic citation pursuant to section 728 of the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, * * * being section 257.728 of the Michigan Compiled

Laws, and the defendant failed to appear.

(c) To fix bail and accept bond in all cases.

(d) To issue search warrants, when authorized to do so by a district court judge.

MCL 691.1407. Immunity from tort liability of government agency; immunity of government officer or employee; hospital exception

Sec. 7. (1) Except as otherwise provided in this act, all governmental agencies shall be immune from tort liability in all cases wherin the government agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

(2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency shall be immune from tort liability for injuries to persons or damages to property caused by the officer, employee, or member while in the course of employment or service or volunteer while acting on behalf of a governmental agency if all of the

following are met:

(a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governemtnal agency is engaged in the exercise or discharge of a governmental function.

(c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

(3) Subsection (2) shall not be construed as altering the law of intentional torts as it existed before July 7, 1986.

(4) This act does not grant immunity to a governmental agency with respect to the ownership or operation of a hospital or county medical care facility or to the agents or employees of such hospital or county medical care facility. As used in this subsection:

(a) "County medical care facility" means that term as defined in section 20104 of the public health code, Act No. 368 of the Public Acts of 1978, being section 333.20104 of the Michigan Compiled Laws.

(b) "Hospital" means a facility offering inpatient, overnight care, and services for observation, diagnosis, and active treatment of an individual with a medical, surgical, obstetric, chronic, or rehabilitative condition requiring the daily direction or supervision or a physician. The term does not include a hospital owned or operated by the department of mental health or a hospital opertated by the department of corrections.

(5) Judges, legislators, and the elective or highest appointive executive officials of all levels of government are immune from tort liability for injuries to persons or damages to property whenever they are acting within the scope of their judicial, legislative, or executive authority.

(6) A guardian ad litem is immune from civil liability for injuries to persons or damages to property whenever he or she is acting within the scope of his or hr authority as guardian ad litem. This subsection applies to actions filed before, on, or after the effective date of the amendatory act that added this subsection.

Amended by P.S. 1996, No. 143, § 2, Imd. Eff. May 1, 1996.

APPENDIX G

OPINION OF 52-A DISTRICT COURT

OPINION

Motion to Quash Warrants

The Fourth Amendment to the United States Constitution has been violated by the procedure followed in this case.

What does the Fourth Amendment require the magistrate do before issuing an arrest warrant?

> "It simply requires that enough information be presented... to enable him to make the judgment that he charges are not capricious and are sufficiently supported to justify bringing into play the further steps of the criminal process." Jaben v. United States, 381 US 214, 224-225, 85 S.Ct. 1365, 1371, 14 L.Ed. 2d 345, 353 (1965), which was adopted by the Michigan Court of Appeals in People v. Hill, 44 MA 308, 205 N.W. 2d. 267 (1973).

The Court of Appeals explained how this was to occur, when it stated:

> "In order to accomplish this result, the magistrate must at least be supplied 'the facts

> relied upon by a complaining officer' and not merely conclusions. It must appear that the affiant spoke with personal knowledge, or else the sources of his belief must be indicated. Where his belief is based on information from other persons some basis for their credibility must be shown." People v. Hill, supra.

In the case before this Court, the complaints contain only legal conclusions without any factual allegations or information supporting those conclusions. Nor is the source of any information revealed. The information and the source of the information could be supplied by sworn testimony adequately preserved for review or affidavits. MCR 6.102. Not one word of sworn testimony was preserved for a judge to review to determine if sufficient exists to issue a warrant.

Why does the Fourth Amendment require the magistrate review the information supporting the complaint before issuing a warrant?

> The Hill Court gave us some understanding when it stated: "...the magistrate's abdication of his decision-making

> responsibility by allowing unquestioning reliance on conclusory complaints based on heresay and other sources which are never identified, and, in any case, preclude the defendant from successfully challenging the legality of the warrant upon a timely objection. That such a practice is constitutionally impermissible is unequivocally stated..." People v. Hill, supra.

The issuance of an arrest warrant is not a ministerial act to be performed in a perfunctory manner. A neutral and independent magistrate must determine if there has been a well reasoned decision to charge someone before placing a person in jeopardy.

What remedy is appropriate when a person's Fourth Amendment right has been violated?

The Defendants agree that the authorization to arrest is the first step to bring a person before the Court beginning the judgment process. It places that persons in jeopardy of losing his or her personal freedom, if bond can not be posted; at least until a preliminary examination is conducted or a

writ of habeas corpus heard. Also, because of public opinion, especially when there has been extensive publicity about the investigation before an arrest is made, it maybe the last step in destroying a life, family, reputation and career. The Court acknowledges that many people will never accept a person is innocent once arrested even if later the case is dismissed. An arrest can imprison them to some degree for the remainder of their life.

The defendants believe the cases should be dismissed, without prejudice. Then the prosecutor would be allowed to present the complaints to be sworn to in accordance with the requirements of the Fourth Amendment, Michigan Court Rule and statute; so that a magistrate could make a proper finding and record. If constitutionally valid warrant could be authorized, the Defendants, would be legally arrested and proceed to preliminary examination. If there was not sufficient sworn testimony to provide the probable cause necessary, no warrant would be issued and the Defendants would be arrested.

The defendant's arguments imply that only suppressing evidence obtained as a result of an illegal arrest is not sufficient to dissuade the bringing of ill founded complaints because little

evidence is obtained after the arrest on a warrant.

The prosecution directs the Court to a Michigan Supreme Court case which was heard a year after the Hill case and which bypassed the Court of Appeals because the Hill decision implied the Court's lacked jurisdiction over a defendant when arrested under the authority of an improper warrant.

The Michigan Supreme Court said:

> "We conclude that while the arrest was indeed invalid because of the inadequacy of the allegations in the complaint this did not divest the trial court of jurisdiction to try the offense charged in the information." People v. Burrill, 391 Mich 124, 214 N.W. 2d. 823 (1974).
>
> "The sole sanction imposed by the United States Supreme Court for the invalidity of an arrest warrant has been the suppression of evidence obtained from the person following an illegal arrest." People v. Burrill, supra.

The Court of Appeals Judge wrote the Hill opinion later reversed himself by saying:

> "To the extent People v. Hill, 44 Mich App 308, 205 N.W. 2d. 267 (1973), implies jurisdiction can not attach. Hill is overruled." People v. Mayberry, 52 Mich App 450, 217 N.W. 2d. 420 (1974).

This Court must follow the rule of law found in People v. Burrill, supra, and respectfully deny the Defendant's motions to dismiss the charges because of violation of their Fourth Amendment rights through the Fourteenth Amendment. The rational contained in Burrill is the defendants will receive a preliminary examination which will safeguard them by providing a probable cause decision before they can be charged in an information is circuit court. This Court does order that any evidence resulting from the arrest of any of the defendant is suppressed.

By its comment, this Court does not find or suggest the prosecution or the magistrate intentionally violated the Defendant's Fourth Amendment rights. Frankly, it may have been a mistake made by an officer not experienced in

presenting complaints and warrants combined with a magistrate not normally involved in issuing complaints and warrants. It is fortunate this occurred because some people will question the manner and procedure chosen by the prosecutor in procuring the warrant. Also, this Court would hope the Michigan State reconsider this issue and determine if other relief should be granted defendants.

/s/ Ralph H. Nelson
District Judge

APPENDIX H

ART. 6 § 13 MICHIGAN CONSTITUTION 1963

Michigan Constitution 1963

Art. 6 § 13. Circuit courts; jurisdiction, writs, supervisory control over inferior courts

Sec. 13. The circuit court shall have original jurisdiction in all matters not prohibited by law; appellate jurisdiction from all inferior courts and tribunals except as otherwise provided by law; power to issue, hear and determine prerogative and remedial writs; supervisory and general control over inferior courts and tribunals within their respective jurisdictions in accordance with rules of the supreme court; and jurisdiction of other cases and matters as provdided by rules of the supreme court.

APPENDIX I

MCR 6.102 1

MCR 8.110 4

MCR RULE 6.102 ARREST ON A WARRANT

(A) Issuance of Warrant. A court must issue an arrest warrant, or a summons in accordance with MCR 6.103, if presented with a proper complaint and if the court finds probable cause to believe that the accused committed the alleged offense.

(B) Probable Cause Determination. A finding of probable cause may be based on hearsay evidence and rely on factual allegations in the complaint, affidavits from the complainant or others, the testimony of a sworn witness adequately preserved to permit review, or any combination of these sources.

(C) Contents of Warrant; Court's Subscription. A warrant must

(1) contain the accused's name, if known, or an identifying name or description;

(2) describe the offense charged in the complaint;

(3) command a peace officer or other person authorized by law to arrest and bring the accused before a judicial officer of the judicial district in which the offense allegedly was committed or some other designated court; and

(4) be signed by the court.

(D) Warrant Specification of Interim Bail. The court may specify on the warrant the bail that an accused may post

to obtain release before arraignment on the warrant and, if the court deems it appropriate, include as a bail condition that the arrest of the accused occur on or before a specified date or within a specified period of time after issuance of the warrant.

(E) Execution and Return of Warrant. Only a peace officer or other person authorized by law may execute an arrest warrant. On execution or attempted execution of the warrant, the officer must make a return on the warrant and deliver it to the court before which the arrested person is to be taken.

(F) Release on Interim Bail. If an accused has been arrested pursuant to a warrant that includes an interim bail provision, the accused must either be arraigned promptly or released pursuant to the interim bail provision. The accused may obtain release by posting the bail on the warrant and by submitting a recognizance to appear before a specified court at a specified date and time, provided that

(1) the accused is arrested prior to the expiration date, if any, of the bail provision;

(2) the accused is arrested in the county in which the warrant was issued, or in which the accused resides or is employed, and the accused is not wanted

on another charge;

(3) the accused is not under the influence of liquor or controlled substance; and

(4) the condition of the accused or the circumstances at the time of arrest do not otherwise suggest a need for judicial review of the original specification of bail.

MCR RULE 8.110 CHIEF JUDGE RULE

(A) Applicability. Except as provided in subrule 8.110(G), this rule applies to all trial courts: i.e., the judicial circuits of the circuit court, the districts of the district court, the probate court in each county or a probate district established by law, the municipal courts, and the Recorder's Court of the City of Detroit.

(B) Chief Judge, Chief Judge Pro Tempore, and Presiding Judges of Divisions.

(1) The Supreme Court shall select a judge of each trial court with two or more judges to serve as chief judge. No later than October 1 of each odd-numbered year, each trial court with two or more judges may submit the names of no fewer than two judges whom the judges of that court recommend for selection as chief judge.

(2)The chief judge shall select a chief judge pro tempore and a presiding judge judge of any division of the trial court. The chief judge pro tempore and any presiding judges shall fulfill such functions as the chief judge assigns.

(3)The chief judge, chief judge pro tempore, and any presiding judges shall serve a two-year term beginning on January 1 of ecah even-numbered year,

provided that the chief judge serves at the pleasure of the Supreme Court and the chief judge pro tempore and any presiding judges serve at the pleasure of the chief judge.

(4) Where exceptional circumstances exist, the Supreme Court may appoint a judge of another court to serve as chief judge of a trial court.

(C) Duties and Powers of the Chief Judge.

(1) A chief judge shall act in conformity with the Michigan Court Rules, administrative orders of the Supreme Court, and local court rules, and should freely solicit the advice and suggestions of the other judges.

(2) As the presiding officer of the court, a chief judge shall:

(a) call and preside over meetings of the court;

(b) appoint committees of the court;

(c) initiate policies concerning the court's internal operations and its position on external matters affecting the court;

(d) meet regularly with all chief judges whose courts are wholly or partially withtin the same county;

(e) represent the court in its relations withthe Supreme Court, other courts, other agencies of government, the bar, the general public, and the

news media, and in ceremonial functions; and

(f) counsel and assist other judges in the performance of their responsibilities.

(3) As director of the administration of the court, a chief judge shall have administrative superintending power and control over the judges of the court and all court personnel with authority and responsibility to:

(a) supervise caseload management and monitor disposition of the judicial work of the court;

(b) direct the apportionment and assignment of the business of the court, subject to the provisions of MCR 8.111;

(c) determine the hours of the court and the judges; coordinate and determine the number of judges and court personnel required to be present at any one time to perform necessary judicial and administrative work of the court, and and require their presence to perform that work;

(d) supervise the performance of all court personnel, with authority to hire, discipline, or discharge such personnel, with the exception of a judge's secretary and law clerk, if any;

(e) coordinate judicial and personnel

vacations and absences, subject to he provisions of subrule (F);

(f) supervise court finances, including financial planning, the preparation and presentation of budgets, and financial reporting;

(g) request assignments of visitng judges and direct the assignment of matters to the visiting judges;

(h) effect compliance by the court with all applicable court rules and provisions of the law; and

(i) perform any act or duty or enter any order necessarily incidental to carrying out the purposes of this rule.

APPENDIX J

PEOPLE v. FARMILO

People v. Farmilo

Before: V.J. Brennan, P.J., and R.B. Burns and C.R. Coleman, JJ.

PER CURIAM. The Oakland County Prosecutor's office prepared a complaint and warrant charging defendant with indecent exposure in violation of MCL 750.335a; MSA 28.567(1) and with being a sexually delinquent person under MCL 750.10a; MSA 28.200(1)

The prosecutor requested that Oakland County Circuit Court Judge Francis O'Brien hear witnesses swear to the complaint and further requested that Judge O'Brien issue a warrant for defendant's arrest. Judge O'Brien declined to hear the witnesses swear to the complaint and refused to issue an arrest warrant, holding that jurisdiction rested with the district court to hear the complaint and issue a warrant. Judge O'Brien entered a written order consistent with his earlier opinion. The prosecutor now appeals from Judge O'Brien's order and we affirm.

District court magistrates are vested with jurisdiction to issue warrants for the arrest of a person upon the written authorization of the

prosecuting or municipal attorney. MCL 600.8511(b); MSA 27A.8511(b). Further, MCL 600.8311; MSA 27A.8311 states:

> "The district court shall have jurisdiction of:
> "(a) Misdemeanors punishable by a fine or imprisonment not exceeding 1 year, or both.
> (b) Ordinance and charter violations punishable by a fine or imprisonment, or both.
> (c) Arraignments, the fixing of bail and the accepting of bonds.
> (d) Preliminary examinations in all felony cases and misdemeanor cases not cognizable by the district court, but there shall not be a preliminary examination for any misdemeanor to be tried in a district court."

Except in cases brought before the circuit court by indictment or appeal from a lower court, the jurisdiction of the circuit court in criminal cases is limited to the crime or crimes included in the return of the examining magistrate. The circuit court gains jurisdiction over a defendant charged with a criminal offense triable in

circuit court upon the filing of a return by the examining magistrate showing that the defendant waived preliminary examination, or that a preliminary examination was had and the defendant was properly bound over for trial. *In re Elliott*, 315 Mich 662; 24 NW2d 528 (1946); 1 Gillespie, Michigan Criminal Law & Procedure (2d ed), § 59, p 115.
AFFIRMED.

APPENDIX K

ORDER OF DISMISSAL OR ACQUITTAL IN *PEOPLE V. BILLIE MARIE IRELAND*

ORDER OF DISMISSAL OR ACQUITTAL

PEOPLE

v.

BILLIE MARIE IRELAND
1140 MICHAELSON
ROCHESTER HILLS, MI 48307

CTN: 63-93-046628-02

CRIME: 750.175(C)
CONSP EMBEZ PUB OFF.

1. IT IS ORDERED THAT THE CHARGE IS DISMISSED.

2. IT IS FURTHER ORDERED THAT THE DEFENDANT SHALL BE IMMEDIATELY DISCHARGED FROM CUSTODY AND CONFINEMENT ON THE ABOVE CHARGE. IF BOND HAS BEEN POSTED IT IS TERMINATED AND THE AMOUNT DEPOSITED SHALL BE RETURNED EXCEPT FOR A PORTION WHICH MAY BE RETAINED AS COURT COSTS FOR THE POSTING OF BOND.

5-25-94 /s/Judge Ralph H. Nelson
#24437

(2)

Supreme Court, U.S.
FILED
OCT 27 1997
CLERK

No. 97-539

In The

Supreme Court of the United States

October Term, 1996

BILLIE M. IRELAND,

Petitioner,

vs.

GARY L. TUNIS, RICHARD THOMPSON, JOHN MEIERS and RICHARD D. KUHN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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1388

QUESTIONS PRESENTED

I. Whether summary judgment was properly granted and affirmed in favor of a state circuit court judge under the doctrine of absolute judicial immunity for the issuance of an arrest warrant where applicable state law provides circuit judges with broad jurisdiction, encompassing the issuance of arrest warrants?

II. Whether summary judgment was properly granted and affirmed in favor of a state prosecutor and assistant prosecutor for the act of procuring an arrest warrant under the doctrine of absolute prosecutorial immunity where the arrest warrant complied with Michigan law in both form and substance and where the circuit judge who issued the warrant did so in compliance with broad jurisdiction granted that judge by Michigan law?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	ii
Statement of the Case	1
A. Introduction.	1
B. Underlying facts.	1
Reasons for Denying the Writ	3
Conclusion	10

TABLE OF CITATIONS

Cases Cited:

Bradley v. Fisher, 13 Wall. 335, 20 L. Ed. 646 (1872)	8
Ireland v. Tunis, 113 F.2d 1435 (1997)	6, 7, 8
Joseph v. Patterson, 795 F.2d 549 (CA6 1986)	9
Kalina v. Fletcher, 95 F.3d 653 (1995), *cert. granted,* __ U.S. __, 117 S. Ct. 1079 (1997)	9
Kingsley Associates, Inc. v. Moll Plasti Crafters, Inc., 65 F.3d 498 (CA6 1995)	7

Contents

	Page
People v. Farmilo, 137 Mich. App. 378, 358 N.W. 2d 350 (1984)	7
People v. Loukas, 104 Mich. App. 204, 304 N.W. 2d 532 (1981)	4
Stump v. Sparkman, 435 U.S. 349, 98 S. Ct. 1099 (1978)	8
Statutes Cited:	
42 U.S.C. § 1983	1, 3
M.C.L. 600.8511	5
M.C.L. 761.1(f)	6
M.C.L. 764.1(a)(1)	5
M.S.A. 27A.8511	5
M.S.A. 28.860(1)(a)	5
M.S.A. 28.860(f)	6
United States Constitution Cited:	
Fourth Amendment	3, 8
Other Authority Cited:	
Michigan Constitution of 1963, Art. 6, § 13	4

STATEMENT OF THE CASE

A. Introduction.

This case involves a straightforward application of absolute immunity, which was held to defeat claims brought under section 1983 against a state court judge, a state prosecutor, and an assistant state prosecutor. Petitioner has attempted to distinguish this case by contriving an argument that a Michigan circuit court judge is not authorized to issue arrest warrants and, accordingly, that the absolute immunity which would otherwise apply to the respondents' actions is lost.

Petitioner's argument was rejected by the trial court in two well-reasoned opinions — the first opinion pertaining to the state circuit judge, the second to the prosecutor and assistant prosecutor. The Sixth Circuit Court of Appeals affirmed. The Sixth Circuit also denied petitioner's motion for rehearing *en banc*. Petitioner now contends that both the trial court and the Sixth Circuit Court erred, and that the intervention of this Court is appropriate.

The lower courts in this case did not err. Petitioner has failed to demonstrate that this matter merits review by this Court.

B. Underlying facts.

Petitioner sets forth her statement of the underlying facts in pp. 8-11 of the petition. That statement omits a number of material facts and either misrepresents other facts or takes them out of context.

The City of Rochester Hills did enter into a contract with Oakland County to have the Oakland County Sheriff's Department provide police services to the city. The contract

called for the tax payers of the city annually to pay Oakland County more than $3,000,000 for police protection. None of the deputies from the Oakland County Sheriff's Department was to be paid directly by the City of Rochester Hills for any of the law enforcement services provided. All compensation for the deputies was to come directly from the county (Apdx. A-40 – A-42).

Nevertheless, petitioner arranged to have Deputy Carlin, while he was a Captain for the Rochester Hills substation, receive compensation directly from the city (R. 29, pp. 188, 192-93; letters attached to R. 50 as Exhibit 6). Petitioner undertook this activity without advising the city council (R. 29, pp. 154-155). The planned payments to Carlin were not reflected in the budget for 1991, the year in which the payments commenced (R. 50). From January 1991 to December 1992, petitioner authorized payments to Carlin from the taxpayer of Rochester Hills in excess of $20,000 (R. 29, pp. 205-06).

In December of 1992, the Oakland County Sheriff's Department began an internal investigation of Carlin. After the investigation was commenced, petitioner spoke with the Rochester Hills City Attorney and, thereafter, requested that the Oakland County Prosecutor's Office commence an investigation into whether petitioner's agreement with Carlin was lawful (R. 30, p. 68).

On October 5, 1993, after a lengthy investigation, Oakland County Assistant Prosecutor Tunis and Investigator John Meiers prepared a written complaint alleging that petitioner had violated various Michigan laws pertaining to the compensation of a county-employed deputy. The complaint was presented to Oakland County Circuit Court Judge Richard Kuhn, who was acting as chief judge of the Oakland County Circuit Court at that time. As chief judge, Judge Kuhn was authorized to issue

arrest warrants when necessary to maintain confidentiality with regard to political situations — a practice which had been maintained in Oakland County for some 20 years (R. 23, Deposition of Judge Kuhn, pp. 7-11). At his deposition in this case, Judge Kuhn testified that the criminal complaint was sworn to under oath in his presence (R. 23, pp. 18-19). Judge Kuhn further testified that the criminal complaint, in his opinion, stated probable cause that an offense had been committed by petitioner (R. 23, pp. 22-23, 25).

On October 5, 1993, Judge Kuhn issued a warrant for petitioner's arrest. The warrant charged petitioner with eight counts (warrant attached to R. 50 as Exhibit 10). Petitioner was arraigned on the eight counts, and a preliminary examination commenced on February 28, 1994. The preliminary examination was conducted by Rochester Hills District Court Judge Ralph Nelson. After four days of testimony, and after noting that "certainly it was a most difficult case," Judge Nelson issued his opinion finding that there was no probable cause to believe the mayor of his city committed the eight crimes with which she was charged. Accordingly, he dismissed the charges against petitioner (Apdx. K-1). Petitioner then brought the instant action under 42 U.S.C. § 1983, alleging that the arrest warrant violated her Fourth Amendment rights.

REASONS FOR DENYING THE WRIT

Petitioner's complaint is based strictly on the issuance of an arrest warrant allegedly without probable cause to arrest. In granting all defendants' motions for summary judgment, United States District Court Judge Rosen issued two carefully-reasoned opinions, finding that all defendants were entitled to immunity. Judge Rosen's first opinion found that defendant Judge Kuhn was entitled to judicial immunity; his second opinion found that the prosecutor and assistant prosecutor were both entitled to

absolute immunity while the prosecutor's investigator was entitled to qualified immunity. All these findings were affirmed in another carefully-reasoned opinion issued by the Sixth Circuit Court of Appeals.

What makes this case particularly inappropriate for review by this Court is this: petitioner appears to concede that this case would involve straightforward applications of judicial, absolute prosecutorial, and qualified immunity, with one caveat. The caveat, the only basis for disputing the lower court's findings that immunity attaches, is a contention that the arrest warrant was issued by a court which lacked jurisdiction to issue the warrant.[1] Yet, this fundamental contention upon which petitioner's entire case is based is flawed.

To the contrary, it is well settled in Michigan that circuit courts are given a broad grant of general jurisdiction. The Michigan Constitution of 1963, Art. 6, § 13 provides that the "circuit court shall have original jurisdiction in all matters not prohibited by law. . . ." Circuit courts are presumed to have jurisdiction unless the matter in question is specifically excluded by law. *People v. Loukas*, 104 Mich. App. 204, 304 N.W. 2d 532 (1981). Petitioner can identify no Michigan case or statute specifically prohibiting a circuit court judge from issuing an arrest warrant. Accordingly, petitioner's argument that Judge Kuhn, Chief Judge of the Oakland County Circuit Court, was without jurisdiction to issue an arrest warrant is without merit.

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1. *See, e.g.*, Petition, p. 23 where petitioner states:

> This case brings before the court an unanswered question: if the prosecution seeks to initiate a prosecution and begins it improperly because the warrant has not been issued by a court with jurisdiction to issue a warrant, is the prosecutor entitled to the protection of absolute immunity attaching to the judicial process?

None of the Michigan cases cited in the petition (*see* Petition, p. 16) stands for the proposition that a Michigan circuit court judge cannot issue an arrest warrant. At most, those cases stand for the undisputed proposition that a Michigan district judge *can* issue an arrest warrant.

The Michigan Legislature has conferred jurisdiction to issue arrest warrants upon magistrates and district court magistrates as follows:

> A magistrate shall issue a warrant upon presentation of a proper complaint alleging the commission of an offense and a finding of reasonable cause to believe that the individual accused in the complaint committed that offense. The complaint shall be sworn to before a magistrate or clerk.

M.C.L. 764.1(a)(1); M.S.A. 28.860(1)(a).

> A district court magistrate shall have the following jurisdiction and duties:
>
> * * *
>
> (b) to issue warrants for the arrest of a person upon the written authorization of the prosecuting or municipal attorney. . . .

M.C.L. 600.8511; M.S.A. 27A.8511.

However, the Michigan Legislature has not prohibited circuit court judges (who, by definition, are not magistrates) from issuing arrest warrants. By contrast, in the very definition of "magistrate" provided by the legislature, circuit court judges are given discretion to perform the duties of a magistrate. Specifically, the definition of "magistrate" provides:

> "Magistrate" means a judge of the district court of a judge of a municipal court. Magistrate does not include a district court magistrate, except that a district court magistrate may exercise the powers, jurisdiction, and duties of a magistrate where explicitly provided in this act, in the revised judicature act of 1961, Act No. 236 of the Public Acts of 1961, as amended, being §§ 660.101 to 600.9947 of the Michigan Compiled Laws, or in any other statute. *This definition does not limit the power of a justice of the supreme court, a circuit judge, or a judge of a court of record having jurisdiction of criminal cases under this act, or deprive him or her of the power to exercise, in his or her discretion, the authority of a magistrate.*

M.C.L. 761.1(f); M.S.A. 28.860(f) (emphasis added).[2]

Thus, Judge Kuhn was authorized to issue the arrest warrant in at least two respects. First, the Michigan Legislature specifically provided that circuit court judges may, in their discretion, exercise the authority of magistrates. Secondly, even if this specific authorization were not included in the definition of "magistrate," it is clear that circuit courts have general jurisdiction over matters unless that jurisdiction is specifically excluded by law. Since petitioner can cite to no Michigan law specifically excluding the jurisdiction of circuit court judges to issue arrest warrants, petitioner's argument that Judge Kuhn's issuance of the arrest warrant was outside of his jurisdiction is without merit. Petitioner's claims against Judge Kuhn, therefore, fail. Petitioner's claims as against respondents Thompson and Tunis also fail since the immunity enjoyed by those respondents exists if Judge Kuhn had a "colorable claim" of jurisdiction. See Opinion of Sixth Circuit Court of Appeals, 113 F.2d at 1444.

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2. The above quoted statutory provision is the version which was in effect at the time the arrest warrant was issued.

Petitioner has ignored all of these statutory provisions, instead relying upon a two-page opinion from the Michigan Court of Appeals, *People v. Farmilo,* 137 Mich. App. 378, 358 N.W. 2d 350 (1984). Petitioner erroneously contends *Farmilo* stands for the proposition that a circuit court judge cannot issue an arrest warrant. On the contrary, *Farmilo* merely stands for the proposition that a circuit judge has the *discretion* either to issue or refuse to issue an arrest warrant. The Sixth Circuit correctly noted in this case:

> We agree with the United States District Court's conclusion that *Farmilo* should not be read as prohibiting a Michigan state circuit judge from issuing an arrest warrant. The issue in *Farmilo* concerned whether a circuit judge was required to issue an arrest warrant when requested to do so, and the Court of Appeals of Michigan upheld the judge's refusal to entertain the warrant request. Thus, *the clear implication of Farmilo's holding is that a circuit court has discretion with respect to issuing, or not issuing, an arrest warrant,* a position entirely consistent with section 761.1(f)'s recognition that a Michigan circuit judge has discretion to exercise the authority of a magistrate judge.

Ireland v. Tunis, 113 F.2d 1435, 1442 (1997) (emphasis added).[3]

Perhaps more importantly, the district court correctly

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3. Counsel for respondents Thompson, Tunis, and Meiers also advised the Sixth Circuit Court that, even if that court were to find an irresolvable conflict in Michigan law as a result of the *Farmilo* decision, the court was not bound to follow *Farmilo,* a decision of Michigan's Court of Appeals, if it believed the Michigan Supreme Court would decide otherwise. *See Kingsley Associates, Inc. v. Moll Plasti Crafters, Inc.,* 65 F.3d 498 (CA6 1995).

determined that Judge Kuhn would be entitled to absolute immunity unless he acted in the "clear absence of all jurisdiction" (Apdx. B-22).[4] The Supreme Court in *Stump v. Sparkman,* 435 U.S. 349, 98 S. Ct. 1099 (1978), quoting *Bradley v. Fisher,* 13 Wall. 335, 20 L. Ed. 646 (1872) held:

> A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority, but rather he will be subject to liability only when he has acted in the "clear absence of all jurisdiction."

Stump, 435 U.S. at 349.

In light of the considerable authority imparting such broad jurisdiction on circuit court judges in Michigan, Judge Kuhn certainly did not act in the clear absence of all jurisdiction. Moreover, with respect to the prosecutor and assistant prosecutor, at no time during any of the proceedings did petitioner cite authority for the proposition that the immunity enjoyed by the prosecutors would somehow be removed even if petitioner could prove that the arrest warrant had not been issued by the correct judge.[5]

The briefs submitted by respondents in both the district court

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4. The issue is not, as petitioner originally argued, whether or not a circuit court has jurisdiction to issue an arrest warrant, but, rather, whether or not the issuance of an arrest warrant by a circuit court judge constitutes a non-judicial act taken in "clear absence of all jurisdiction."

5. The petition also appears to allege in passing that the arrest warrant violated the Fourth Amendment, although no argument to that effect is advanced. In any event, it is undisputed that the complaint fully complied with Michigan law regarding form and substance. *See* 113 F.2d at 1449, n.12.

and the Sixth Circuit Court of Appeals set forth additional arguments sufficient to dispose of petitioner's claims. For purposes of brevity, and because petitioner's primary argument so clearly fails, those arguments are omitted from this response. However, respondents also wish to point out that petitioner has not demonstrated and cannot demonstrate how this case presents compelling reasons warranting the grant of the requested writ. No conflict among the circuits has been alleged. [6] No important federal question has been decided in a way which conflicts with a state court of last resort. The lower courts in this case did not err.[7]

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6. Petitioner alleges that *Joseph v. Patterson*, 795 F.2d 549 (CA6 1986) is in conflict with other circuits, and that that conflict is now before this Court in *Kalina v. Fletcher*, 95 F.3d 653 (1995), *cert. granted*, __ U.S. __, 117 S. Ct. 1079 (1997) (Petition, pp. 22-23). However, the facts of *Kalina* are distinguishable from the instant case. In *Kalina*, the plaintiff alleged that the prosecutor made false statements in an affidavit supporting an application for an arrest warrant. There is no such allegation in the instant case. Rather, petitioner here alleges that the mere presentation of an application for an arrest warrant to a judicial officer is not accompanied by absolute immunity if presented to a judicial officer without jurisdiction. This issue is not an issue in *Kalina*.

7. Defendant Meiers was granted summary judgment on the grounds of qualified immunity. Because petitioner has not addressed that ruling in her questions presented, any challenge to the rulings with respect to defendant Meiers has been waived. Accordingly, the issues pertaining to Meiers are not addressed in this response. In any event, the district court and Sixth Circuit Court of Appeals correctly agreed that Meiers is entitled to qualified immunity for his alleged activities.

CONCLUSION

For the reasons given above, respondents request that the petition for writ of certiorari be denied.

Respectfully submitted,

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